BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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Live testimony suppression hearing

Entrapment

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

I. Sentencing Entrapment

A. Sentencing Entrapment is not a viable legal defense to the offense of trafficking in a controlled substance.

"Sentencing entrapment" is a theory utilized by defendants in the federal system to obtain downward departures in sentencing. The argument, as accepted by the Ninth Circuit Court of Appeals in U.S. v. Staufer, 38 F.3d 1103 (9th Cir. 1994), is that the Federal Sentencing Guidelines allow for a downward departure in circumstances where "a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment." Id. at 1106 (quoting United States v. Stuart, 923 F.2d 607, 614 (9th Cir.), cert. denied, 499 U.S. 967, 111 S.Ct. 1599 (1991). The Court reached this decision by interpreting the relevant portion of the Sentencing Guidelines, namely 18 U.S.C. 3553(b). Id. at 1106-1107. Not all federal circuit courts agree with this interpretation. See, e.g., United States v. Williams, 954 F2d 668 (11th Cir. 1992); United States v. Connell, 960 F.2d 191 (1st Cir. 1992).

The defense argues that "the Ninth Circuit's reasoning is directly analogous on the State court level." That analogy is unsound.

C. The Government simply provided the defendant with the opportunity to commit the offense and, therefore, did not act improperly.

Even if it is assumed, as the defendant suggests, that the defendant had never before committed the crime of trafficking, that alone would not require a finding of sentencing entrapment. As in the analysis for entrapment, it is imperative that the Court scrutinize government activity. "The entrapment defense is made available to defendants not to excuse their criminal wrongdoing but as a prophylactic device designed to prevent police misconduct." Shrader, 101 Nev. at 501. The law of entrapment speaks

of "seduction", "improper inducement" and creating "extraordinary temptation". Oliver v. State, 101 Nev. 308, 309, 703 P.2d 869 (1985). In the arena of sentence entrapment, a defendant is required "to show that the government engaged in outrageous official conduct which overcomes the will of an individual..." U.S. v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994). Furthermore, "...the mere furnishing of an opportunity for criminal conduct does not constitute entrapment." Shrader,
101 Nev. at 502; citing Wyatt v. State, 77 Nev. 490, 367 P.2d 104 (1961); In re Wright, 69 Nev. 259, 248 P.2d 1080 (1952).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
Deputy District Attorney

Evidence Admissibility 911 Tapes

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE COURT SHOULD RULE THE
911 TAPE ADMISSIBLE

> Pursuant to NRS 52.252,
> The content of recordings of telephone calls made through a system established to provide a telephone number to be used in an emergency, if otherwise admissible, may be proved by a copy or transcript of the recording which is authenticated by a custodian of the records of the system in a signed affidavit. The custodian must verify in the affidavit that the copy or transcript is a true and complete reproduction of the original recording and that the original recording was made at the time of the telephone call and in the course of a regularly conducted activity.

Based on the foregoing statute, and the affidavit of the custodian of records, Tina Blee, the State requests that the court rule the 911 tape, and it's accompanying transcript admissible.

II.

PURSUANT TO THE COURT'S RULING
OF ADMISSIBILITY, THE STATE REQUESTS
PERMISSION TO PLAY THE 911 TAPE IN
OPENING STATEMENT

The purpose of opening statement is to prepare the jurors' minds to follow the evidence and to be able to discern its materiality, force and effect. Because the presentation of such evidence in Opening Statement would aid that purpose for the jurors, the court has the discretion to permit the use of admissible evidence by the court in Opening Statement. In People v. Green, 47 Cal.2d 209, 302 P.2d 307 (1956), the prosecutor showed a motion picture in opening statement which revealed the location where a robbery took place. He also showed the jury objects that later would be marked as exhibits, and photographs of the victim's wounds and a photograph of the defendant in prison garb. The California

Supreme Court ruled that it was within the trial court's discretion to permit the use of such items in Opening Statement.

The court of appeal followed the same logic in People v. Kirk 43 Cal.App.3d 921, at 929, 117 Cal.Rptr. 345 (1974). In permitting the use of a tape recording in opening statement. The defendant was charged and convicted of various counts of grand theft stemming from false insurance claims. During opening statement, the prosecutor played portions of a tape sent by the defendant to a friend. In those portions, the defendant spoke of his criminal plans. On appeal, the defendant complained about the prosecutor playing the tape in opening before it had been authenticated. The court of appeal found no error.

In People v. Fauber 831 P.2d 249, 9 Cal.Rptr.2d 24, 2 Cal.4th 792 (Cal. 1992), a key piece of evidence in the murder case was the testimony of a man named Rowan. Rowan had testified at the preliminary hearing under a grant of immunity. When discussing Rowan in opening statement, the prosecutor put up a blow up of a page of Rowan's preliminary hearing transcript testimony highlighting the most incriminating portions. The defendant appealed and claimed use of this exhibit in opening statement was improper. The Supreme Court ruled it was proper. The Court noted that it is axiomatic that nothing said in opening statement is evidence, and that there could have been no valid objection if the prosecutor had merely read the evidence. The Court rejected the argument that the use of the evidence preconditioned the jury to accept Rowan's testimony. The Court also dismissed the contention that the mere appearance of the poster was so official that it caused the jury to prejudge Rowan's credibility.

In People v. Wash, 6 Cal.4th 215,at 257, 24 Cal.Rptr.2d 421, 861 P.2d 1107 (1993), the California Supreme Court approved the use of a multi-media presentation in opening statement in the penalty phase of a murder trial.

III.

CONCLUSION

Though there is no specific case involving this issue in Nevada, it is within the court's discretion to permit the use of evidence ruled admissible by the court in Opening Statement. Therefore,

based on the foregoing law, the State requests that the evidence be admitted, and that the State be permitted to present the 911 tape in opening statement.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

11022023

Evidence Failure to Preserve Destruction of Weapon

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* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE

TO PRESERVE EVIDENCE

COMES NOW, the State of Nevada by and through Richard A. Gammick, District Attorney of Washoe County and , Deputy District Attorney, and hereby opposes defendant's Motion to Dismiss for Failure to Preserve Evidence. DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

I. THE DUE PROCESS RIGHTS OF THE DEFENDANT

WERE NOT VIOLATED

In Sheriff V. Warner, 112 Nev. 1234, 926 P.2d 775 (1996), the Nevada Supreme Court held:

[in] order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case *and* the evidence possessed an exculpatory value that was apparent before the evidence was destroyed. (emphasis added).

As the defendant does not allege any bad faith on the part of the state, the focus becomes (1) whether the loss unduly prejudiced the defendant's case *and* (2) whether the exculpatory value of the evidence was apparent before its destruction.

A. THE ACCIDENTAL DESTRUCTION OF THE SAWED-OFF SHOTGUN DID

NOT PREJUDICE THE DEFENDANT'S CASE

The burden of proving the defendant was unduly prejudiced lies with the defendant. Id. at 1240. Furthermore, this burden of proof requires some showing that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense. It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense.

> Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)(citation omitted); see also Sterling v. State, 108 Nev. 391, 834 P.2d 400 (1992). Warner at 1240.

Although the detection of fingerprints is not an exact science, certainly an investigator with over 17 years of experience is competent to examine a firearm. This is especially true in light of the fact that it would be in the State's best interest to find fingerprints as well as the defendants. The fact that a re-examination could *possibly* have revealed fingerprints most certainly does not meet the standard of demonstrating prejudice. It is merely a "hoped-for" conclusion which, according to Warner, is insufficient.

Finally, even if fingerprints were found on the shotgun, and even if the prints turned out to be those of Mark Reynolds, any value of the fingerprints would be minimal at best. Possession of the weapon can be actual or constructive, sole or joint. Maskaly v. State, 85 Nev. 111, 450 P.2d 790 (1969) See Mitchell v. State, 114 Nev. Adv. Op. , 971 P.2d 813 (1998). The State is not required to prove actual possession by the defendant nor exclusive possession by the defendant. Two or more persons may have joint possession of an item if they knowingly exercise dominion and control over it.

Such was the claim in Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In Ybarra, a young woman was brutally raped, burned and left to die alongside a roadway. During the autopsy, a vaginal swab and vaginal smear were preserved from the serous fluid drawn from the victim. The remainder of the fluid was not preserved. Ybarra argued that had the remaining fluid been preserved, tests could have been conducted which may have exonerated him. The State maintained the same results would have been reached with regards to any additional testing. The Nevada Supreme Court held the, "Loss of the fluid, therefore, did not constitute lost evidence which resulted in any prejudice to the accused." Id. at 173.

B. DESTRUCTION OF THE FIREARM WAS NOT EXCULPATORY WITH REGARDS TO THE ELEMENT OF "FIREARM"

Defendant cites Barnes v. Housewright, 603 F.Supp. 330 (1985) for the proposition that because a gun was found with a bullet in the chamber and rounds in the pistol grip, a jury could reasonably infer the pistol would shoot even without direct proof of the fact. Unlike the State of Nevada, it is clear in Barnes that an element of the offense is that the weapon must be operable. The court allowed

circumstantial evidence of such fact. Neither the court nor the jury required the gun actually be shot to prove it was operable. Such an issue was for the jury to decide.

> In other words, Barnes argues that by not proving that a projectile might be expelled from this particular weapon, the state failed to prove that the weapon was a "firearm" within the meaning of the statute. This point was ably argued by counsel for Barnes at trial and the jury was instructed in the state law. Barnes has not complained about the adequacy of these instructions and the trial jury found him guilty of possession of a "firearm" within the meaning of state law. Id. at 333.

Furthermore, in Rusling v. State, 96 Nev. 778, 617 P.2d. 1302 (1980), the defendant contended the trial court erred in failing to instruct the jury that the operability of the firearm was an element to be proven by the State. The gun was never test fired and the only evidence presented was that of two police officers who testified the gun "appeared operable" and that it contained ammunition. The Nevada Supreme Court concluded,

> It was within the judgment of the jury to conclude that the gun was a firearm within the definition of NRS 202.360. See State v. Cartwright, 246 Or. 120, 418 P.2d 822, 830-831 (Or.1966), cert. denied, 386 U.S. 937, 87 S.Ct. 961, 17 L.Ed.2d 810 (1967).

It is a question of fact for the jury to decide whether or not the state has met its burden in proving the sawed-off shotgun is a firearm. Any potentially exculpatory information as to whether or not this is a "real" firearm can be easily brought out through cross-examination of witnesses.

Clearly the defense is attempting to stretch this lost evidence into a possible defense. Merely being helpful in preparing a defense in insufficient according to Warner. The possible defense that the shotgun may not have actually been a shotgun is, once again, a "hoped for" conclusion and totally insufficient to justify dismissal.

Defendant cites Howard v. State, 95 Nev. 580, 600 P.2d 214 (1979) for the proposition that the lost or destroyed evidence was exculpatory and prejudicial. However, Howard is easily distinguished in that identity was the issue and the witnesses contradicted each other as to the identity of the perpetrator. In Howard, the defendant denied running across red gravel as testified to by one of the witnesses. Other witnesses contradicted that testimony. The shoes would have provided evidence of

whether or not the defendant ran across the red gravel. Furthermore, the shoes were never examined for red dust unlike the instant case where the shotgun was examined for fingerprints.

Sparks v. State, 104 Nev. 316, 759 P.2d 180 is easily distinguished as well. In Sparks, Appellant alleges that she has been prejudiced, and it is her burden to show "that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense." Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979). In describing this test of materiality, the Supreme Court in United States v. Agurs, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342 (1976), stated that the lost evidence "must be evaluated in the context of the entire record." The question is whether when so evaluated a reasonable doubt exists which was not otherwise present.

Sparks was a murder case in which there were no witnesses to the homicide and the defense was one of self-defense. Thus, her defense rested almost exclusively on her testimony. The State, however, retrieved the murder weapon, visually examined the gun for blood and hair and then released the weapon to the victim's son. The gun was never taken to the crime laboratory for testing. As a result, the only possible evidence which could have corroborated the defendant's version of events was destroyed and was thereby inherently prejudicial.

In the instant case, and unlike Sparks, the gun was taken to the crime laboratory and tested for fingerprints by a seventeen year veteran of the Washoe County Sheriff's Office. No fingerprints were found. Even had prints been found, given the law on joint possession, the fingerprints would not have been exculpatory.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Evidence Failure to Gather as Opposed to Preserve

CODE

Richard A. Gammick
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

OPPOSITION TO MOTION TO DISMISS FOR FAILURE

TO PRESERVE EVIDENCE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and offers its Opposition to Motion to Dismiss for Failure to Preserve Evidence.

This Opposition is based upon the attached Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Defendant contends that the State has failed to preserve potentially exculpatory evidence. Defendant's Motion, pp. 5-6; Sheriff v. Warner, 112 Nev. 1234 (1996).

The State respectfully suggests that defendant has misidentified the pertinent issue in this case. Defendant is really complaining about an alleged failure of the State to gather evidence, as opposed to an alleged failure by the State to preserve evidence. The Nevada Supreme Court very recently addressed this difference. See, Daniels v. State, 114 Nev. Adv. Op. 32 filed April 2, 1998.

In Daniels, the appellant was convicted of two counts of First Degree Murder with the Use of a Deadly Weapon and two counts of Robbery with the Use of a Deadly Weapon. Appellant told several police officers that he had ingested PCP about one hour before the shooting incident. At trial appellant presented expert testimony to show that PCP can cause hallucinations, loss of awareness of one's surroundings, and confusion about one's self and what one is doing. Appellant offered this testimony in support of an intoxication defense to negate the element of specific intent. Daniels, Id., slip opinion, at pp. 4-5. Although at least two police officers were aware of appellant's claim that he ingested PCP one hour

before the subject shooting, the police did not attempt to obtain blood from appellant. Appellant complained that this negatively impacted his ability to prove to the jury that he was acting under the influence of PCP when the shooting occurred, in support of his claim of drug intoxication.

> The Nevada Supreme Court noted:
> Although Daniels characterizes the state's inaction as a failure to preserve evidence, his claim of error actually relates to the state's failure to gather blood evidence from Daniels immediately following his arrest....
>
> In relying on case law involving the failure to preserve evidence, Daniels fails to distinguish between collection and preservation of evidence. Had the state gathered blood evidence from Daniels and then allowed it to be lost or failed to deliver it to Daniels counsel, his argument would be more tenable.... Daniels, Id., at pp. 5-6 (emphasis in original).

The Nevada Supreme Court then went on to announce a new test which shall control in all cases where the State has failed to gather evidence, as opposed to a failure to preserve evidence once it had been gathered. The Nevada Supreme Court adopted the Bagley standard to control in all cases where the defense alleges that the State had improperly failed to gather evidence. The Nevada Supreme Court stated:

> In State v. Ware, 881 P.2d 679 N. Mex. (1994), the New Mexico Supreme Court established a two-part test. The first part requires the defense to show that the evidence was 'material,' meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different. Id., at p. 685; see, United States v. Bagley, 473 U.S. 667 (1985). If the evidence was material, then the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case. Ware, 881 P.2d at 685-686. When mere negligence is involved, no sanctions are imposed, but the defendant can still examine the prosecution's witnesses about the investigative deficiencies. Id. When gross negligence is involved, the defendant is entitled to a presumption that the evidence would have been unfavorable to the state. Id. In cases of bad faith, we conclude that dismissal of the charges may be an available remedy based upon an evaluation of the case as a whole. Daniels, Id., at pp. 6-7.

Defendant has already stipulated that the State was not acting in bad faith in not collecting the items complained of. Thus, dismissal is not appropriate pursuant to the Bagley standard set forth above.

The next issue that must be determined is whether in the instant case the police acted with 1) gross negligence, 2) ordinary negligence, or 3) no negligence at all. The State respectfully suggests that the third alternative is applicable -- i.e., the police were clearly not negligent.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Evidence Failure to Gather as Opposed to Preserve II

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Defendant contends that the intervening delay since his entry of plea may have inhibited his ability to interview and call as witnesses potential alibi witnesses. However, defendant's motion does not specifically state that any of the potential alibi witnesses cannot be located. Additionally, the motion does not specifically state that any of the alleged alibi witnesses' memories or ability to testify have been inhibited in any particular way. At most the motion suggests that the intervening time period "might" have affected the defendant's ability to present an alibi defense. The burden is on the defendant to show actual prejudice. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972); Sheriff v. McKinney, 93 Nev. 313, 314 (1977). Defendant's motion fails to demonstrate actual prejudice.

Defendant specifically contends that the defense failed to "preserve" any media tapes which showed the defendant's photograph.

The State respectfully suggests that the defendant has misidentified the pertinent issue. Defendant is really complaining about an alleged failure of the State to **gather** evidence, as opposed to an alleged failure by the State to **preserve** evidence. The Nevada Supreme Court very recently addressed this difference. See, Daniels v. State, 114 Nev. Adv. Op. 32, filed April 2, 1998.

In Daniels, the appellant was convicted of two counts of First Degree Murder with the Use of a Deadly Weapon and two counts of Robbery with the Use of a Deadly Weapon. Appellant told several police officers that he had ingested PCP about one hour before the shooting. At trial appellant presented expert testimony to show that PCP can cause hallucinations, loss of awareness of one's surroundings, and confusion about one's self and what one is doing. Appellant offered his testimony in support of an intoxication defense to negate the element of specific intent. Daniels, Id., slip opinion, at

pages 4-5. Although at least two police officers were aware of appellant's claim that he ingested PCP one hour before the subject shooting, the police did not attempt to obtain blood from appellant. Appellant complained that this negatively impacted his ability to prove to the jury that he was acting under the influence of PCP when the shooting occurred, in support of his claim of drug intoxication.

> The Nevada Supreme Court noted:
> Although Daniels characterizes the state's inaction as the failure to preserve evidence, his claim of error actually relates to the state's failure to gather blood evidence from Daniels immediately following his arrest....
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> In relying on case law involving the failure to preserve evidence, Daniels fails to distinguish between collection and preservation of evidence. Had the state gathered blood evidence from Daniels and then allowed it to be lost or failed to deliver it to Daniels counsel, his argument would be more tenable. Daniels, Id., at pages 5-6. (Emphasis in original).

The Nevada Supreme Court then went on to announce a new test which shall control in all cases where the State has failed to **gather** evidence, as opposed to the failure to **preserve** evidence once it has been gathered. The Nevada Supreme Court adopted the Bagley standard to control in all cases where the defense alleges that the State had improperly failed to gather evidence. The Nevada Supreme Court stated:

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CONCLUSION

.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Evidence Sufficiency for Appeal Standard of Revue

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

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RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The law in Nevada is quite simple when determining the proper areas of inquiry when an appeal is filed. The Nevada Supreme Court states:

> . . .when the sufficiency of the evidence is challenged on appeal in a criminal case, "[t]he relevant inquiry for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)(citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)(emphasis in original).

Hutchins v. State, 110 Nev. 103, 107-08 (1994). In Tellis v. State, 85 Nev. 679 (1969), the Nevada Supreme Court also states that, "[i]t has been well established that where there is substantial evidence in the record to support the verdict of the jury, it will not be overturned by an appellate court. Cross v. State, 85 Nev. ___, 460 P.2d 151 (1969); Criswell v. State, 84 Nev. 459, 443 P.2d 552 (198); Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968); Henry v. State, 83 Nev. 194, 426 P.2d 791 (1967)." Tellis, 85 Nev. at 679-680.

The Nevada Supreme Court has also addressed the issue of credibility of witnesses when a matter is on appeal. In Brandon v. Travitsky, 86 Nev. 613 (1970), the Court reiterates the general standard of review discussed above. They go on to state, "[t]his rule is particularly applicable where the evidence is conflicting and the credibility of witnesses and weight to be given evidence is in issue." Id., 85 Nev. at 615 (citations omitted). In Azbill v. State, 88 Nev. 240 (1972), the Court states, "[w]here questions of fact are dependent upon the credibility of witnesses, the jury is entitled to decide questions of credibility and the weight to be attached to their testimony. Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961)." Azbill, 88 Nev. 252. *See also*, Glegola v. State, 110 Nev. 344 (1994) ("It is for the jury to determine the weight and

credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal, where, as here, substantial evidence supports the verdict.")(citations omitted).

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Evidence Suppression Terry Stop Inevitable Discover Full Discussion

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and , Deputy District Attorney, and files this OPPOSITION TO MOTION TO SUPPRESS (hereinafter, "Opposition"). The Opposition is pursuant to the United States Constitution, the Nevada Constitution, NRS 171.123, Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526 (1994), Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 (1983), Oregon v. Mathiason, 429 U.S. 492, 94 S.Ct. 711 (1977), Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972), Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), Miranda v. Arizona, 384 U.S. 436, 85 S.Ct. 1602 (1966), State v. Sonnenfeld, 114 Nev.Adv.Op 73 (1998), State v. Burkholder, 112 Nev. 535 (1996), Gamma v. State, 112 Nev. 833 (1996), State v. Wright, 104 Nev. 521

(1988), Carlisle v. State, 98 Nev. 128 (1982), Rusling v. State, 96 Nev. 773 (1980), Stuart v. State, 94 Nev. 721 (1978), the Points and Authorities attached hereto and incorporated herein by this reference, all the pleadings, papers and authorities on file with this Court in this action, the testimony to be presented on February 17, 1999, at the hearing on this motion, and any oral argument the Court requires.

Dated this ___ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By:_____

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant's motion raises two main issues. Issue "A" addresses the evidence collected during the contact between the police and the defendant. Issue "B" addresses statements made by the defendant during that contact. The State will address the issues in the order presented.

A. ALL OF THE PHYSICAL EVIDENCE SEIZED SHOULD BE SUPPRESSED BECAUSE THE EVIDENCE WAS SEIZED THROUGH UNLAWFUL SEARCH OF WAYNE ALAN GEISINGER'S PERSON.

The defendant's motion appears to make the broad assertion that all the contact between the defendant and law enforcement during the incident in question was unconstitutional. Clearly, such an assertion is untenable. The initial contact between the defendant and law enforcement was nothing more than a consensual contact between the parties. The Nevada Supreme Court has addressed such a situation

in State v.Burkholder, 112 Nev. 535 (1996). In Burkholder RPD officers observed Burkholder conducting himself in a manner consistent with the actions of a drug dealer or user. The officers approached Burkholder and identified themselves. The officers ". . .asked Burkholder if he would answer a few questions. Burkholder replied 'yes'." Burkholder, 112 Nev. at 537. Burkholder also answered the basic questions put to him without a *Miranda* warning. Id.

In analyzing the situation the Nevada Supreme Court first acknowledges Terry v. Ohio, 392 U.S. 1 (1968), and its progeny. The Court then states, "[m]ere police questioning does not constitute a seizure. Florida v. Bostick, 501 U.S. 429, 434 (1991)." Burkholder, 112 Nev. at 538. The Court goes on to state:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Burkholder, 112 Nev. at 538-39 (quoting Florida v. Royer, 460 U.S. 491, 497 (1983)).

The inescapable conclusion, based on Burkholder, is that the initial contact between the defendant and law enforcement was nothing more than consensual questioning. Any allegation that the law enforcement were in a place they were not allowed to be, or illegally detaining the defendant initially is simply not based on the facts presented.

The defendant's motion claims that the contact was a violation of his Fourth Amendment rights as outlined in Terry, *supra.* Again, the claim is not supported by federal law or the law in Nevada. The defendant's claims in this area are nothing more than a shortsighted glance at a broad issue. When the facts are applied to the law it becomes obvious that the officers did not violate the defendant's rights.

The Nevada Supreme Court has long followed the ruling announced in Terry. There is a two-prong test to determine whether an investigative detention passes constitutional muster:

> [In] determining whether the seizure and search were "reasonable" our inquiry is a dual one--whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

State v. Sonnenfeld, 114 Nev.Adv.Op 73 (1998)(quoting Terry, 592 U.S. at 19-20). The Nevada Legislature has codified this seminal area of constitutional law in NRS 171.123.

> In Rusling v. State, 96 Nev. 778, 781 (1980), the Nevada Supreme Court states:
> Even though probable cause may not exist to place a person under arrest, a police officer may, under appropriate circumstances and in proper manner, approach and detain a person for the purpose of investigating possible criminal behavior. Terry v. Ohio, 392 U.S.1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968); Stuart v. State, 94 Nev. 721, 722, 587 P.2d 33, 34 (178); Jackson v. State, 90 Nev. 266, 267, 523 P.2d 850, 851 (1974); Wright v. State, 88 Nev. 460, 464, 499 P.2d 1216, 1219 (1972); NRS 171.123(1).

The facts in Rusling are on point with the issues presented in the defendant's motion. The appellant was stopped by Las Vegas police because he resembled a person seen fleeing from an abandoned vehicle. The police searched for the person who fled for approximately one hour. They eventually stopped the appellant because he resembled the person they saw fleeing. *See*, Rusling, 96 Nev. at 780. The Court held that the brief detention and search of the defendant was appropriate. The Court noted that the following factors in coming to this decision:

> Appellant emerged from the area where the police officers had reason to believe the suspect was lurking; he matched the description broadcast by Officer Harber. Officer Shelton was, therefore, justified in approaching appellant and stopping him for the purpose of further investigation.

Id., 96 Nev. at 781.

In State v. Wright, 104 Nev. 521 (1988), the Court again addressed the brief detention associated with a *Terry* stop. The facts are even more attenuated than those in Rusling. In Wright the appellant was driving a vehicle similar to one involved in a robbery that had occurred the previous evening. The vehicle was not the same. The police had information that the robbery suspects were black, yet the occupants of the car were white. Further, the vehicle was only "in the area" of the previous robbery. The police found a bullet in plain view which lead to further contraband. The appellant sought suppression of all evidence based on Terry.

The Nevada Supreme Court held that the officers were correct in briefly detaining the vehicle and its occupants even with these facts. The Court stated:

> A stop is lawful if police reasonably suspect that the persons or vehicles stopped have been involved in criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Stuart

> v. State, 94 Nev. 721, 587 P.2d 33 (1978); Ildefonso v. State, 88 Nev. 307, 496 P.2d 752 (1972); NRS 171.123. * * * The officers could reasonably decide that vital information could be obtained from examining the vehicle and briefly questioning its occupants. This provided a particularized and objective basis for stopping Wright's vehicle. Cortez, *supra*, 449 U.S. at 417, 101 S.Ct. at 694.
>
> We conclude that the stop was reasonable and lawful, and did not violate respondent's constitutional rights. The bullet found lying on the floorboard was in plain view; therefore its discovery was not unlawful. California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); Wright v. State, 88 Nev. 460, 499 P.2d 1216 (1972).

Wright, 104 Nev. at 523.

The Nevada Supreme Court has held that it was not a *Terry* violation for officers to stop a vehicle based on a tip from a bar tender. Sonnenfeld, *supra*. The Court has also held that it is not a *Terry* violation to stop a vehicle based only on the fact that the trunk lock was missing. The officer was investigating whether the vehicle was stolen. Marijuana seeds found in plain view were deemed admissible after the stop. Stuart v. State, 94 Nev. 721, 722-23 (1978)("Under these circumstances, we believe the officer's conclusion was reasonable and he was justified in stopping the vehicle for routine questioning and investigation. Since the officer had lawfully attained the position from which he observed the marijuana in plain view, he had a right to seize it and, therefore, the marijuana was properly admitted." (citations omitted)).

The defendant's motion makes a "pretext stop" argument. The defendant attempts to buttress this argument by a reference to Alejandre v. State, 111 Nev. 1235 (1995). In a footnote, the defendant concedes that Alejandre has been directly overruled by both Gamma v. State, 112 Nev. 833 (1996), and Wren v. United States, ___ U.S. ___, 116 S.Ct. 1769 (1996). The State is unable to follow the mental gymnastics which would allow an overruled case to somehow control the issues presented by the defendant's motion. Suffice to say that both Alejandre and Gamma addressed the stop of vehicles for minor violations and subsequent searches. Those issues have no bearing in the present case given the fact that the officers were conducting a legal investigation pursuant to Terry and the defendant's consent.

The defendant's motion claims that the officers did not have a search warrant, consequently they did not have a right to search the defendant's person. This contention ignores the fact

that the defendant consented to the search. As discussed, *supra*, consent negates the need for a warrant. Further, given the defendant's strange and unresponsive behavior and the officer's knowledge that he had been using a piece of metal to pry the machines, the officers were within the edicts of NRS 171.1232.

A non-invasive "pat search" has long been approved by the United States Supreme Court. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923 (1972). In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), the Court held that a pat search for weapons was appropriate simply because a person walked away from officers and entered an alley. There was no indication that there were weapons on the individual. The concern arose from his evasive behavior and the fact that he had been seen leaving a "notorious 'crack house'." Id., 508 U.S. at 368. The defendant's behavior in the instant case coupled with the officer's knowledge that a piece of metal was involved was enough to give them a right to do a "pat search".

During the "pat search" the officers detected further paraphernalia in the defendant's pockets. They were entitled to remove those items. In Dickerson, *supra*, the Court held:

> "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id., 508 U.S. at 345-76. Nothing that the officers did on September 22, 1997, violated this holding.

The seizure of the drug pipe found in the defendant's back pocket was appropriate. It was in "plain-view", consequently the officers could seize it. The United States Supreme Court has held, "[u]nder that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." Dickerson, 598 U.S. at 375 (citations omitted). The defendant attempts to get around this pernicious fact by alleging that the officers somehow did not have a lawful right to be where they were when the drug pipe was observed. The assertion is simply not supported by the facts. The officers were summoned to remove the defendant from the store. They were in a public place.

Even if they did not conduct the legal *Terry* stop, the officers would still have observed the drug pipe when the defendant stood to leave.

The defendant looks into his crystal ball and comes up with two exceptions to the warrant requirement that he anticipates will be argued by the State: Terry and "plain view". He was correct. The defendant should have looked deeper, however, because he ignored the final deleterious exception which completely trumps all arguments presented in the defendant's motion: inevitable discovery.

In Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), the United States Supreme Court adopted the inevitable discovery exception to the exclusionary rule. Simply put, the Court held that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means-. . .-then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." Id., 467 U.S. at 444. The Court goes on to point out, "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id., 467 U.S. at 446. The Nevada Supreme Court has also adopted this prevailing concept of constitutional law. In Carlisle v. State, 98 Nev. 128 (1982), the Nevada Supreme Court stated:

> We have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence. (Citations omitted).

Id., 98 Nev. at 129-130.

B. The analysis of this issue is moot given the Burkholder, *supra*. The defendant consent in the same fashion as the suspect in that case.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, ___ (1966), requires an explanation of rights during "custodial interrogation". An officer's obligation to administer the warning attaches, "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495, 94 S.Ct. 711, 74, 50 L.Ed.2d 714 (1977). The "ultimate inquiry is

simply whether there [was] a 'formal arrest or restrain on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.d 1275 (1983). "Custody" depends on an objective analysis of the circumstances, not a subjective analysis. Stansbury v. California, 511 U.S. 318, ___, 114 S.Ct. 1526, 529 (1994). In order to require the *Miranda* warning there must be both custody and interrogation.

Not all instances of police questioning are, however, custodial and/or interrogation. The United States Supreme Court has specifically removed *Terry* stops from the rubric of Miranda and its progeny. In Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), Justice Marshall, speaking for the Court, declined to extend *Miranda* warnings to traffic stops and analogous *Terry* stop situations. The Court found that these situations are "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda itself, and in subsequent cases in which we have applied Miranda." Berkermer, 468 U.S. at 439 (citations omitted).

The officers were not required to inform the defendant of his *Miranda* rights based on Berkermer. The questioning was brief, and related only to possible items which may be found during the lawful pat search. It was neither custodial, nor interrogatory. All of the defendant's statements are admissible.

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Evidence Quantum to Bind Over

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION

OF FOR Case No. CR

A WRIT OF HABEAS CORPUS. Dept. No.

_____/

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, by and through , Deputy District Attorney of Washoe County, Nevada, and moves the above-entitled Court to enter an order denying the Defendant's petition for Writ of Habeas Corpus.

STATEMENT OF CASE

ARGUMENT

I

QUANTUM OF EVIDENCE TO BIND OVER

The defendant may be bound over for trial if the evidence adduced at the preliminary hearing is sufficient to establish probable cause to believe that a crime was committed and that the defendant committed it. Thedford v. Sheriff, 86 Nev. 741 (1970); State v. von Bricken, 86 Nev. 769 (1970); Sheriff,

Clark County v. Lyons, 96 Nev. 298 (1980). See also NRS 171.206 (degree of evidence to warrant the magistrate to hold the defendant to answer in the District Court).

The finding of probable cause may be based on slight, even marginal evidence because it does not involve a determination of the guilt of or innocence of an accused. Sheriff v. Crockett, 102 Nev. 359 (1986); Sheriff v. Hodes, 96 Nev. 184 (1980); Kinsey v. Sheriff, 87 Nev. 361.

This Court should not now be concerned with the prospect that the evidence presently in the record may, by itself, be insufficient to sustain conviction. Miller v. Sheriff, 95 Nev. 255 (1979); McDonald v. Sheriff, 89 Nev. 326 (1973). Accordingly, the State need not produce the quantum of proof required to establish the guilt of the accused beyond a reasonable doubt. Kinsey v. Sheriff, supra.

It is not the function of the Supreme Court, or of the magistrate at the preliminary hearing, or of the District Court upon the habeas corpus proceeding to pass upon the sufficiency of the evidence to justify conviction. Lamb v. Holsten, 85 Nev. 566 (1969) affirming Beasley v. Lamb, 79 Nev. 78 (1963). To commit a defendant for trial, the State is not required to negate all inferences but only to present enough evidence as to support a reasonable inference that the accused committed the offence. Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966)

CONCLUSION

A preliminary examination is not a substitute for a trial. As the Court in Marcum v. Sheriff, Clark County, 85 Nev. 175 (1969) states with regard to a preliminary examination:

> Its purpose is to determine whether a public offense has been committed and whether there is sufficient cause to believe that the accused committed it. The State must offer some competent evidence on these points to convince the magistrate that a trial should be held. The issue of innocence or guilt is not before the magistrate. That function is constitutionally placed elsewhere. The full and complete exploration of all of the facts of the case is reserved for the trial and is not the function of the preliminary examination.

The State respectfully submits that this Court can draw any and all reasonable inferences from the facts adduced at the preliminary examination. The State submits that probable cause was established based on all the facts presented before the magistrate.

Based upon the foregoing, it is respectfully requested that this Court enter an Order denying defendant's Petition for Writ a Habeas Corpus.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____
Deputy District Attorney

Ex-Parte Judge Recusal Prosecution Recusal

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Ex Parte is defined in Black's Law Dictionary as relating to:

> one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

It is the State's position that a concerned citizen who has information about a case, who is not a witness for either side, who neither side solicits the information for their own behalf and who wants to speak to the judge about the case should not be restrained by a party to speak to the judge. It is the judge's responsibility, not the party to the lawsuit, to avoid the appearance of impropriety according to the Judicial Canons of Ethics CANON 3.A, which spells out the judge's responsibilities to perform the duties of judicial office impartially and diligently. This Canon specifically relates to judges and it states:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision p

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

There is Commentary that follows, which states:

> The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.
>
> To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.
>
> Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.
>
> An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.
>
> Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3(B)(7)(b) regarding a proceeding pending or impending before the judge.
>
> A judge must not independently investigate facts in a case and must consider only the evidence presented.
>
> A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.
>
> A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.
>
> If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Under the common law, as a general rule, one person owed no duty to control the dangerous conduct of another, nor to warn those endangered by such conduct. (See *Tarasoff v. Regents of University of California,* 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976); Rest. 2d, Torts (1965) *§*

314). However, the common law has carved out an exception to this rule in cases where the defendant bears some *special relationship* to the dangerous person or to the potential victim. (See *Tarasoff v. Regents of University of California*, supra ; Rest. 2d, Torts 1965) *§§* 314A, 315. In such circumstances, the defendant is impressed with a duty to warn foreseeable victims of foreseeable harm. Cf. *Thomas v. Bokelman*, 86 Nev. 10, 462 P.2d 1020 (1970); *Tarasoff v. Regents of University of California*, supra; as cited in *Mangeris v. Gordon*, 94 Nev. 400, 403, 580 P.2d 481, 483(Nev. 1978).

It should be noted also that the defendant cites *no authority* for the proposition that the District Attorney's Office should be recused.

In fact, there are not many cases in Nevada law dealing with the recusal of an entire District Attorney's Office in a case. In fact, the courts have stated that to do so would only be warranted in the *most extreme circumstances* (see below). The State argues that this would not be such a circumstance.

The Nevada Supreme Court agreed with the Indiana Supreme Court in *Collier v. Legakes,*98 Nev. 307,646 P.2d 1219, at 1220-1221(Nev. 1982) when it quoted from *State v. Tippecanoe County Court,* 432 N.E.2d 1377, 1379 (Ind.1982):

> (E)thical rules require that a lawyer should avoid even the appearance of professional impropriety and that in certain situations the disqualification of one lawyer within a law firm means that all members of the firm are also disqualified. Canons 5 and 9, DR 5-105(D).

While this principle is strictly enforced in the context of civil actions conducted by private law firms, it is less strictly applied to government agencies. Where a lawyer who has represented a criminal defendant on prior occasions is one of the deputy prosecutors, disqualification of the entire office is not necessarily appropriate. Individual rather than vicarious disqualification may be the appropriate action, depending upon the specific facts involved. (Emphasis added).

Furthermore, the *Collier* Court stated that the order to recuse the prosecutor can only happen after an *evidentiary hearing*. At page 1221, the Court stated that:

> The district court shall conduct an evidentiary hearing on defendant Cardarelli's motion, and after a consideration of all the relevant facts, shall determine whether the prosecutorial function can be carried out by the Clark County District Attorney's Office impartially and without breach of any privileged communication.

The "privileged communication that the Court speaks of is when the prosecutor has been the defendant's lawyer at a time prior to the case and has heard things about the defendant pursuant to the *attorney-client privilege*. *It does not relate to information from a disinterested third party who is not a witness and doesn't provide any information in furtherance of the State's case.*

> The Collier Court goes on to say at page 1221:
> Further, we recognize that vicarious disqualification may be warranted in *extreme cases* where the appearance of unfairness or impropriety is so great that the public trust and confidence in our criminal justice system could not be maintained without such action. (Emphasis added.)

The Supreme Court also stated how the issue of prosecutorial recusal is usually presented. In *Brinkman v. State*, 95 Nev. 220, 592 P.2d 163,(Nev. 1979) at page 164, the Court stated:

> Generally, a prosecutor is disqualified from personally acting in a criminal case if he has previously represented the accused in the same or a similar matter. (See Annot., 31 A.L.R.3d 953 (1970). Here, six years had elapsed since the prior case, the charges were completely unrelated, there was no threat of the destruction or impairment of a privileged relationship, and his prior counsel played no part in the prosecution of the subsequent case. Compare *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (N.M.App.1974), cert. denied, 86 N.M. 372, 524 P.2d 988; *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972). Accordingly, appellant's contention that the trial court erred in its refusal to recuse the entire district attorney's office is meritless. *People v. Wright*, 23 Ill.App.3d 43, 318 N.E.2d 102 (1974).
>
> To order a recusal of the entire office under these facts would be highly unusual.

The United States Supreme Court has set the standard of conduct that a prosecutor must follow. That standard is that [a] prosecutor has "a duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____

Excited Utterance Hearsay Exception

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Is the victim's statements made to the deputy sheriff six hours later regarding how she obtained her injury and excited utterance exception to the hearsay rule?

There are several cases in which Courts have determined what is an excited utterance. All agree that the inquiry should be taken on a factual basis.

In Guthrie v. U.S., 207 F.2d 19, (C.A.D.C. 1953), the fact that eleven hours had passed before the utterance was made and the fact that the utterance was in response to a question was of no moment to the Court.

> At page 25 the Court writes,
>
> It is impossible to formulate a hard and fast rule for determining whether the declaration of a victim of violence is admissible as a spontaneous utterance, that is, whether it was made during a period of nervous stress and shock caused by physical violence when the victim is presumed to be incapable of artifice or premeditation to serve his own interests. The fact that the statement is an answer to a question is not fatal to spontaneity. In Beausoliel v. United States, 1939, 71 App.D.C. 111, 113-114, 107 F.2d 292, 294-295, we said:
>
> Declarations, exclamations and remarks made by the victim of a crime after the time of its occurrence are sometimes admissible upon the theory that 'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy * * * .' (3 Wigmore, Evidence § 1747 (2d ed. 1923).)
>
> What constitutes a spontaneous utterance such as will bring it within this exception to the hearsay rule must depend, necessarily, upon the

> facts peculiar to each case, and be determined by the exercise of sound judicial discretion, which should not be disturbed on appeal unless clearly erroneous**.**
>
> [92 U.S.App.D.C. 365] 'That the statements in the present case were made in response to inquiry is not decisive of the question of spontaneity, as appellant contends, although that fact is entitled to consideration. Likewise, while the time element is important, it is not in itself controlling. 'Indeed, as has been well asserted, no inflexible rule as to the length of interval between the act charged against the accused and the declaration of the complaining party, can be laid down as established."

In McQueen v. U.S.,262 F.2d 455,(C.A.D.C. 1958) in a PER CURIAM

opinion at page 456 the same Court ruled,

> Appellant McQueen was indicted, tried and convicted for robbery. At about three o'clock one morning two police officers heard shots and ran to the scene. They saw a man (later identified as 'Lee Bong') in a yard waving a pistol and yelling, 'You robbed me; you robbed me.' The officers saw McQueen leaving a shed in the yard. Later they found a wallet in a trash can beside the shed. Lee Bong identified it as his. While still on the scene McQueen admitted his guilt to the offense. Lee Bong died of a heart attack shortly after this affair and so was not a witness at the trial. Upon this appeal counsel for McQueen raises several points about the admissibility of evidence, particularly with regard to the officers' testimony concerning Lee Bong's utterances on the scene. We find no error. (Footnote omitted).
>
> Affirmed.

Thus, the fact that an officer is the one that hears the statement is of no moment.

Next, in Baber v. U.S., 324 F.2d 390, (C.A.D.C. 1963) in a rape case, the witness (who was available) testified what happened, then her father testified what the victim told him had just happened and then the policeman testified about what she had recounted to the him sometime later. Both the victim's statement and her father's statement came in as spontaneous utterances. The statements made to the police were viewed as hearsay without an exception but viewed as cumulative and as harmless error because it was consistent with what the victim had said and what the father had said.

At page 394, the Court determined relative to the statement to the police officer some 25 minutes later that,

> Even on the assumption that the testimony should not have been admitted as a spontaneous declaration, we do not believe that reversible error occurred in this connection. The hearsay rule is primarily designed to exclude testimony of extra-judicial declarations when those

> declarations are introduced for the purpose of proving the truth of their content. In this case, however, the testimony of the police officers was merely cumulative for that purpose, since the story had already been fully related to the jury by the complaining witness and by the father in his account of her spontaneous declaration immediately after the culprit had fled. The complaining witness was of course seen and heard by the jury and was cross-examined as to her story. We are convinced that no error affecting substantial rights occurred as a result of the admission of the policemen's testimony.

Turning now to this jurisdiction, the Nevada Supreme Court has spoken on this issue as well. In Dearing v. State, 691 P.2d 419, 100 Nev. 590, (Nev. 1984) in a PER CURIAM opinion the Court said:

> This is an appeal from a judgment of conviction upon a jury verdict of one count of sexual assault and one count of lewdness with a minor. For the reasons expressed below, we affirm the conviction.
>
> Appellant raises several assignments of error in this appeal. The only issue requiring discussion, however, is appellant's [100 Nev. 592] assertion that the testimony of three witnesses was erroneously admitted over hearsay objections.
>
> The first such item of testimony was given by the victim's father, and consisted essentially of his repetition of the victim's description of the assault. The victim's recitation occurred only minutes after the attack, and the father's conversation with the victim was prompted by his observation that she was "agitated and nervous." Accordingly, the testimony was properly received as an excited utterance. NRS 51.095; United States v. Nick, 604 F.2d 1199 (9th Cir.1979); see generally C. McCormick, McCormick on Evidence Sec. 297 (3d ed. 1984). It is of no import that the district court gave a different reason for admitting the testimony, even if that reason was incorrect. See Cunningham v. State, 100 Nev. --- n. 1, 683 P.2d 500 (1984).
>
> The second item of testimony objected to was that of a police detective who interviewed the victim about one and one-half hours later. The testimony was substantively similar to that of the victim's father. Again, however, the victim was at that time "nervous and upset," and the time between the event and the statement was relatively short. Accordingly, in light of the authorities cited above, the testimony was properly
> admitted despite the district court's apparent reliance upon a different rationale.
>
> The third item of testimony was that of the victim's mother, during which she repeated the victim's description of the attack. We note that appellant's trial counsel cross-examined the child witness at considerable length with the apparent intention of implying that the child's credibility was questionable. Although counsel did not suggest any specific motive for fabrication or indicate where or when such a

> motive might have arisen, counsel's heavy cross-examination of the victim was directed at impugning her credibility. In light of the heavy cross-examination, the state attempted to rehabilitate the victim's credibility by offering prior consistent statements which the victim had made to her mother just a few days after the attack.
>
> We conclude that the district court did not abuse its discretion by admitting the mother's testimony regarding the prior consistent statements. See State v. Pitts, 62 Wash.2d 294, 382 P.2d 508 (1963). As the court states in Pitts: "Repetition adds stature to imputations and insinuations and may well infer recent fabrication. The trial court saw and heard the live performance; it was in a position to [100 Nev. 593] weigh any innuendoes and nuances, and it admitted [the prior consistent statement] for the limited purpose stated." Id. 382 P.2d at 510-11. Given the circumstances of the present case, we cannot say that the district court erred in allowing the mother to testify regarding statements made by the child, which rebutted the implication of fabrication raised by defense counsel. Cf. Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981) (where the defense suggests a motive to fabricate, corroborative testimony introduced for the purpose of rehabilitation must affirmatively show that the repeated statement was originally made at a time when the declarant had no motive to fabricate); see also NRS 51.035(2)(b).
>
> Further, in Hogan v. State, 732 P.2d 422, 103 Nev. 21,(Nev. 1987)

at 425 in a PER CURIAM opinion, the Court stated,

> Second, hearsay testimony that Hogan had threatened to kill Ms. Hinkley was admissible under NRS 51.095, the "excited utterance" exception to the hearsay rule. Two witnesses testified that the victim told them Hogan had threatened to kill her. One statement came just after the threat; the other, approximately an hour later. In each case, Ms. Hinkley was frightened, shaking, nervous and crying. Thus, the court did not err in finding the statements admissible, see Dearing v. State, 100 Nev. 590, 691 P.2d 419 (1984).
>
> Most recently, in Felix v. State, 849 P.2d 220, 109 Nev. 151, (Nev. 1993) the Nevada

Supreme Court has articulated this rule about hearsay evidence,

> To find hearsay statement reliable, court must examine totality of circumstances surrounding statement and find that declarant was particularly likely to be telling truth when statement was made, statement was at least as reliable as evidence admitted under any of the accepted hearsay exceptions, and statement was so trustworthy that adversarial questioning would add little to its reliability. U.S.C.A. Const.Amend. 6; N.R.S. 51.385.

Thus, the import of all of these cases is that it is well within the trial court's discretion as to whether or not a statement made is within the excited utterance exception. Depending on the facts of the case, a statement can be viewed as excited if given even 11 hours later.

It is well established that excited utterances do not violate the Sixth Amendment's Confrontation Clause. In Puleio v. Vose, 830 F. 2d 77 (1st Cir. 1987), that Court said that

> the hearsay exception to excited utterances is firmly rooted in the hearsay exception and entails no denial of confrontation rights even if the declarant is unavailable. The court must make a preliminary factual determination that the statement at issue falls within the hearsay exception before allowing it into evidence.

Furthermore, the Nevada Supreme Court has said that errors concerning hearsay and confrontation clause of U.S. 6th amendment are subject to harmless error analysis. (See NRS 51.035 and 51.065.) Franco v. State, 109 Nev. 1229, 266 P.2d 247 (1993).

The United States Supreme Court has stated, in general, that:

> testimonial privileges contravene the fundamental principle that the public has a right to every man's evidence. Therefore, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding the relevant evidence has a public good which transcends the normal predominant principle of utilizing all rational means of ascertainment of the truth. (See, *Trammel v. United States,* 445 U.S. 40 (1980).

With this in mind, it must be asked, who holds the privilege? Clearly, the patient holds the privilege as does the physician on the patient's behalf. (See NRS 49.215 to 49.245, inclusive).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Exculpatory Evidence Notice of

CODE 2610
Richard A. Gammick
#001510
P.O. Box 30083
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

Dept. No.

,

Defendant.
_____/

NOTICE OF POTENTIALLY EXCULPATORY EVIDENCE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and makes the following disclosure of potentially exculpatory evidence in the above captioned cases pursuant to Homick v. State, 112 Nev. 304, 913 P.2d 1280 (1996); Roberts v. State, 110 Nev. 1121, 881 P.2d 1 (1994); Wallace v. State, 88 Nev. 549, 501 P.2d 1036 (1972); and Brady v. Maryland, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed 2d 215 (1963).

Dated this _____ day of _____, 1999.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Exclusion of Certain Words

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR
RESPONSE TO DEFENDANT'S

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO EXCLUDE THE USE OF THE WORDS "VICTIM," "MURDER," AND "HOMICIDE."

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Information filed in this case charges both defendants with several counts, including "**Murder** in the First Degree with a Deadly Weapon." This charge stems from the shooting death of Branson Clark. Throughout the Information, Mr. Clark is referred to as the "victim." Defendant Moore seeks to preclude the prosecution from using the words, "victim," "murder," and "homicide" during the prosecution of this case, arguing that these terms pre-judge a question of fact and violate Mr. Moore's presumption of innocence. Respectfully, this motion is without merit and should be denied.

Clearly, a criminal defendant is presumed innocent until proven guilty beyond a reasonable doubt. NRS 175.191. Our Supreme Court has held that not only is a defendant entitled to the presumption of innocence, "but also to indicia of innocence." Haywood v. State, 107 Nev. 285, 288 (1991). Almost always a criminal defendant is entitled to appear before the jury without physical restraints and dressed in street clothes, as opposed to jail clothing. Grooms v. State, 96 Nev. 143 (1980). In Haywood, the Court held that verbal references to the defendant's custodial status "also may provide an appearance of guilt that a jury mistakenly might use as evidence of guilt." In that case, the defendant claimed prejudice with respect to two statements made by the State or its witnesses. First, a police detective used the term "gang unit" when discussing different methods that law enforcement uses to locate someone. However, the statement was made in reference to a defense witness, and not the defendant. And second, the prosecutor made reference to the defendant's in-custody status when cross-examining him about jail visits that he

received from others. The Court did find the prosecutor's questions about jail visits improper, but determined that the error was harmless beyond a reasonable doubt and affirmed the judgment. Id.

"Homicide" is defined as the killing of one person by another. NRS 200.120. Homicide, by itself, is not necessarily a criminal act, unless committed in an unlawful manner. NRS 200.010 - NRS 200.260. As a result, use of this word is not prejudicial.

"Murder" is defined as "the unlawful killing of a human being, with malice aforethought, either express or implied, or caused by a controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 of NRS." NRS 200.010. Both defendants are charged with "murder" and it would be absurd to require the state not to use the word "murder" in a murder prosecution.

"Victim" has been defined in several statutes and includes a person "who has been injured or killed as a direct result of the commission of a crime." NRS 213.005; NRS 178.569. It is undisputed that Branson Clark died from several gunshot wounds after being fired upon while seated in his car, and as a result, he falls squarely within the definition of "victim." Mr. Clark is properly referred to several times in the charging document as the victim, as this is his legal status.

Use of the words "victim," "homicide," and "murder" is not prejudicial and does not violate the "indicia of innocence" referred to in Haywood, supra. Referring to Mr. Clark as the victim of a homicide or murder can clearly be distinguished from referring to a defendant's custodial status. These words constitute the legal status of Mr. Clark and name one of the charges with which the defendants are being tried. The Court and the attorneys for the defendants can address their concerns regarding the use of these words through voir dire to make sure potential jurors understand that the defendants are presumed innocent until proven guilty, and the mere fact that they have been charged is no proof of the defendants' guilt.

Respectfully, the defendant's motion to exclude the use of "murder," "homicide," and "victim" should be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____
Deputy District Attorney

Execution Warrant and Order of Committal

CODE
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

WARRANT OF EXECUTION

A JUDGMENT OF DEATH was entered on the 13th day of March, 1995, against the above-named defendant, ALVARO CALAMBRO, as a result of his having been found guilty of one count of Murder in the First Degree with the Use of a Deadly Weapon, by a three judge panel.

The panel, with the Honorable MILLS LANE presiding, after determining the defendant's guilt pursuant to said defendant's plea of guilty to Count I, MURDER OF THE FIRST DEGREE WITH THE USE OF A DEADLY WEAPON, in violation of NRS 200.010 and 200.030, entered judgement of conviction on or about the 16th day of March, 1995. The same three judge panel then proceeded to hear evidence and deliberated on the punishment to be imposed as provided by NRS 175.552 and 175.554. Thereafter, the same panel returned with the sentence that the defendant should be punished by Death, and found that there were aggravating circumstances connected with the commission of said crime, as follows:

1 - 16. Prior convictions of crimes of violence. NRS 200.033(2)

17. Evidence that the murder was committed by ALVARO CALAMBRO during the commission of the crime of Robbery. NRS 200.033(4)

18. Evidence that the murder involved depravity of the mind and mutilation of the victim. NRS 200.033(8)

19. Evidence that the murder was committed upon one or more persons at random and without apparent motive. NRS 200.033(9)

That on or about the 17th day of March, 1995, the panel unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, said verdict having been returned in the County of Washoe, State of Nevada. The court at this time, having determined that no legal reason exists against the execution of the Judgment.

IT IS HEREBY ORDERED that the County Clerk of the County of Washoe, State of Nevada, shall forthwith, execute, in triplicate, under the Seal of the Court, certified copies of the Warrant of Execution, the Judgment of Conviction, and of the entry thereof in the Minutes of the Court. The original of the triplicate copies of the Judgment of Conviction, Warrant of Execution, and entry thereof in the Minutes of the Court, shall be filed in the Office of the County Clerk, and two of the triplicate copies shall be immediately delivered by the Clerk to the Sheriff of Washoe County, State of Nevada.

IT IS FURTHER ORDERED that one of the triplicate copies be delivered by the Sheriff to the Director of the Department of Prisons or to such person as the Director shall designate. The Sheriff is hereby directed to take charge of the said defendant, ALVARO CALAMBRO, and transport and deliver the prisoner, forthwith, to the Director of the Department of Prisons at the Nevada State Prison located at or near Carson City, State of Nevada, and said prisoner, ALVARO CALAMBRO, is to be surrendered to the custody of the said Director of the Department of Prisons or to such authorized person so designated by the Director of the Department of Prison, for the imprisonment and execution of the said defendant, ALVARO CALAMBRO, in accordance with the provisions of this Warrant of Execution.

IT IS FURTHER ORDERED that in connection with the above facts and pursuant to the provisions of NRS 176.345 and 176.355, the Director of the Department of Prisons, or such persons as shall by him be designated, shall carry out said Judgment and Sentence by executing the said ALVARO CALAMBRO by injection of a lethal drug, within the limits of the State Prison located at or near Carson City, State of Nevada, during the week commencing on Monday, the _____ day of _____, 1998, in the presence of the Director of the Department of Prisons, not less than six nor more than nine reputable citizens over the age of twenty-one years, to be selected by the said Director of the Department of Prisons, and a competent physician, but no other persons shall be present at said execution.

Dated this _____ day of _____, .

_____
DISTRICT JUDGE

CODE

Richard A. Gammick
#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ORDER OF EXECUTION

A JUDGEMENT OF DEATH having been entered on the 13th day of March, 1995, against the above named defendant, ALVARO CALAMBRO, as a result of his having been found guilty of one count of Murder of the First Degree with the Use of a Deadly Weapon, by a duly and legally impaneled three judge panel; and

WHEREAS, this Court has made inquiry into the facts and found no legal reasons against the execution of the judgment of Death,

IT IS HEREBY ORDERED that the Director of the Department of Prisons shall execute the Judgement of Death by an injection of a lethal drug, within the limits of the State Prison located at or near Carson City, State of Nevada, during the week

commencing on Monday, the _____ day of _____, 1998, in the presence of the Director of the Department of Prisons, not less than six nor more than nine reputable citizens over the age of twenty-one years, to be selected by the said Director of Prisons, and a competent physician, but no other person shall be present at said execution.

Dated this _____ day of _____, .

_____

DISTRICT JUDGE
IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

ORDER OF COMMITTAL

TO THE SHERIFF OF WASHOE COUNTY, AND THE WARDEN OR OFFICERS IN CHARGE OF THE STATE PRISON OF THE STATE OF NEVADA,

GREETINGS:

WHEREAS, ALVARO CALAMBRO, having entered a plea of guilty to the Crimes of one count of Murder in the First Degree with the Use of a Deadly Weapon, and the defendant having been found guilty by a three judge panel of the crimes of one count of Murder in the First Degree with the Use of a Firearm, and judgment having been pronounced against him that he be punished by the imposition of the Death Penalty by the administration of an injection of a lethal drug or combination of drugs.

All of which appears of record in the office of the Clerk of said Court and a certified copy of the Judgment being attached hereto and made a part hereof.

Now this is to command you, the said sheriff, to safely deliver the said ALVARO CALAMBRO, into the custody of the said Warden or his duly authorized representative, when requested to do so,

and this is to command you, the said Warden or your duly authorized deputy, to receive from the said Sheriff, the said ALVARO CALAMBRO, to be sentenced as aforesaid, and that the ALVARO CALAMBRO be put to death by an injection of a lethal drug or combination of drugs.

And these presents shall be your authority to do so.

HEREIN FAIL NOT.

WITNESS, Honorable _____, Judge of the said District Court at the Courthouse, in the County of Washoe, this _____ day of _____, .

Witness my hand and the Seal of said Court, the day and year last above written.

_____
Clerk

Exigent Circumstances Blood

CODE
Richard A. Gammick
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

SEARCH AND SEIZURE WAS VALID UNDER THE CONSTITUTION AS EXIGENT CIRCUMSTANCES EXISTED.

Assuming, arguendo, the blood test was not a consensual search, the results would still be admissible as there were exigent circumstances that justified a warrantless search.

In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966), the United States Supreme Court held that because the percentage of alcohol in the blood of the accused begins to diminish shortly after the accused stopped drinking, exigent circumstances may justify a warrantless seizure of the accused's

blood. *Id.* at 770-771. See also Preston v. United States, 376 U.S. 364, 367, 84 S.Ct 881.

Therefore, because the defendant's blood alcohol level would have diminished, thus destroying the evidence, had the trooper taken the home to secure a warrant, the trooper was justified in requiring the defendant to submit to a blood test without a warrant. As such, the defendant's motion to suppress should be denied.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Expert Witness Death Penalty

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 50.275 provides as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

In light of this statute defendant defendant's expert witness, Notice of Intent to Call Expert Witnesses, hereinafter Notice, will not offer information that "will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275.

The religious, moral and ethical implications of the death penalty are proper subjects for testimony at the legislature but not for the jury in this case. No fact determination will be assisted and no evidence understanding will be aided by any testimony on religion, morals or ethics.

If the State were to attach an "aggravating" label to particular religious views it would be clearly unconstitutional to the sentencing process. How then does the defendant create a relevant and constitutional label for "mitigation" evidence when religious, moral and ethical views are offered? The defendant cannot. Those factors are constitutionally impermissible and irrelevant to the sentencing process. cf. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983).

> This Court has stated that a death sentence based upon consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant," would violate the Constitution. (citation omitted)

Baldwin v. Alabama, 472 U.S. 372, 105 S.Ct. 2727 (1985)

NRS 175.552(3) provides that "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the Court deems relevant to sentence, whether or not the evidence is ordinarily admissible." The defendant's experts will offer nothing "relative to the offense, defendant or victim." Id. The experts will only offer "objections to the administration of the death penalty." Notice pp. 1, 2. Read literally that could mean the experts want to discuss lethal injection, gas and hanging and which is better under their religious, moral and ethical scheme. Read as the defendant probably intended, then aren't these experts asking this jury and this Court to nullify all the decisions and statutes which allow imposition of the death penalty.

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968), requires that jurors cannot automatically vote against the death penalty. What could these experts provide to any jury except a litany of "never impose" dialogue which a qualified juror may not possess? "No so-called expert conclusions can serve the jury's function." Dawson v. State, 84 Nev. 260 (1968). The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.

Townsend v. State, 103 Nev. 113, 117 (1987). None of defendant Harte's experts will assist this trier of fact in understanding evidence or in determining any fact.

Therefore, the State respectfully requests that this Court issue an Order precluding the defendant from offering any testimony regarding any religious, moral or ethical objections to the death penalty.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

_____

Deputy District Attorney

Expert Witness Notice

CODE
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#001510
P.O. Box 30083
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

NOTICE OF EXPERT WITNESSES PURSUANT TO NRS 174.234

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and hereby gives notice of the name of the expert witness intended to be called during the State's case-in-chief. A curriculum vitae of the proposed witness is attached hereto.

Expert Witness Credibility Testimony

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Supreme Court of Nevada addressed the issue of use of experts who comment on directly or indirectly on the credibility of another witness in Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987). In that case, the Court allowed an expert on post-traumatic stress disorder patterns in sexually abused children to opine that the witness-victim in that case displayed patterns consistent with having been sexually abused and that in her opinion the witness-victim had been sexually abused. However, the prosecutor went on to ask the expert if she had an opinion as to whether the witness-victim's truthfulness. The expert said yes and detailed the reasons for her opinion without ever indicating what her conclusion was. Basically, the State had the expert indirectly opine that the witness-victim was truthful in her opinion. The Court said, "..., it is generally inappropriate for either a prosecution or defense expert to directly characterize a putative victim's testimony as being truthful or false." See Townsend, 103 Nev. at page 119, 734 P.2d at page 709. The Court went on to say:

> Here, the prosecutor asked the State's expert if she had formed a conclusion to the victim's truthfulness. After responding affirmatively, the expert detailed her reasons for the conclusion she reached *without ever indicating what her conclusion was*. However, the question and the expert's response left no doubt as to her answer. This was improper since it invaded the prerogative of the jury to make unassisted factual determinations where expert testimony is unnecessary. The jury was certainly equipped to weigh and sift the evidence and reach its own conclusion concerning the child's veracity. Although the admissibility of expert testimony is a matter for the sound discretion of the trial judge, (citations omitted) both the prosecutor's question, and hence, the detailed response, should have been excluded.

(Emphasis in the original text) Again, see Townsend, 103 Nev. at page 119, 734 P.2d 709. The Court has made it clear that the issue of credibility of a witness-victim is exclusively the responsibility of the jury. Expert opinions on that issue are not admissible. The State respectfully contends that Dr. Howle's opinions and statements as cited herein are such inadmissible opinions.

CONCLUSION

DATED this ____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Expert Witness at Counsel Table Juror Consultant

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

A court's refusal to permit a parties expert witness to sit at counsel table has been upheld on appeal. UAW v. Michigan, 886 F.2d 766, 771 (6th Cir. 1989).

The instant motion cites to a generalized authority of effective assistance at counsel pursuant to the Sixth Amendment of the United States Constitution. In Re: Lord, 868 P.2d 835, (Wash. 1994) 855 the Supreme Court of Washington held that a defendant was not entitled to a jury consultant during the selection of a jury in a capital case at public expense.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

_____

Deputy District Attorney

Expert Testimony When It Is Not

CODE
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#001510
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

STATISTICAL EVIDENCE OF DNA TESTING IS ADMISSIBLE WITHOUT TESTIMONY OF A POPULATION GENETICIST.

In a case with a similar issue as set forth in the instant motion, the Tenth Circuit Court of Appeals concluded that a DNA Laboratory Expert was properly qualified to testify regarding population genetics. United State v. Davis, 40 F.3d 1069, 1075 (1994). The Court held, "statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed." After the court reviewed the qualifications of the government's DNA expert, the court concluded that the witness could testify "about genetics within the context of DNA evidence." Id. at 1075; see also State v, Isley, 936 P.2d 275, 280 (Kan. 1997).

In United States v. Ortiz, 125 F.3d 863 (10th Cir. 1997), a Mr. Ranadive, an employee of Cellmark Diagnostic, did not testify as to identify of the individual whose DNA was found in their case. She testified as to the probability of finding someone with that specific DNA profile in each of the three ethnic groups for which Cellmark Diagnostic keeps as a data base. The Ortiz court concluded this type of expert testimony was proper pursuant to Federal Rules of Evidence 703 (expert opinion testimony). Further, the Ortiz court cited United States v. Davis, supra affirmatively for the proposition that the statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed.

The acceptance within the scientific community of the statistics generated in DNA testing is now virtually unquestioned. Recent cases in almost all federal and state jurisdictions have embraced the astronomical statistical probabilities DNA testing produces. An excellent example of how a state judicial system addressed the changing scientific

evidence in this area is the Washington Supreme Court in State v. Buckner, 941 P.2d 667 (1997). In this case, the Supreme Court reversed its earlier decision involving the admissibility of DNA evidence as it relates to statistical analysis. The court held that based upon the new NRC criteria, "we now conclude there should be no bar to an expert giving his or her expert opinion, that, based upon an exceedingly small probability of a defendant's DNA profile matching that of another in a random human population, the profile is unique."

By analogy it is not necessary for the parties seeking to introduce evidence of fingerprint identification to establish the statistical likelihood that no two fingerprints match. That is equally true of DNA evidence. The vast majority of appellate court cases since 1996, have embraced the statistical aspect of DNA testing as being generally accepted within the scientific community and a necessary element of DNA testimony. State v. Copeland, 922 P.2d 1304 (Wash. 1996); State v. Hummert, 933 P.2d 1187 (Ariz. 1997) (en banc); State v. Peters, 944 P.2d 896, 903 (N.M. App. 1997); State v. Boles, 933 P.2d 1197, 1200 (Ariz. 1997) (en banc); State v. Lyons, 924 P.2d 802, 808-09 (Ore. 1996); State v. Jones, 922 P.2d 806, 810-11 (Wash,. 1996) (en banc); State v. Cannon, 922 P.2d 1293, 1299-1301 (Wash. 1996) (en banc).

The remedy is not exclusion of the statistical evidence. The Ninth Circuit opined that, "*Daubert* cautioned lower courts not to confuse the role of judge and jury by forgetting that 'vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof' rather than exclusion 'are the traditional and appropriate means of attacking shaky but admissible evidence'" United States v. Chischilly, 30 F.3d 1144, 1154, (9th Cir. 1994). As indicated above, the statistical aspect of DNA is now accepted within the scientific community.

NRS 50.285 PERMITS EVIDENCE OF DNA STATISTICS

> NRS 50.285 states:
> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.
> 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

CONCLUSION

In fact, defendants have appealed the failure to admit statistical evidence in a DNA context. They were unsuccessful.

Brodine v. State, 936 P.2d 545, 551-52 (Alaska Ct.App. 1997); Sholler v. Commonwealth, 45 K.L.S. 7, 20 (Kent. 96-SC-856-MR, 6/1898).

Dated this _____ day of _____, .

_____
RICHARD A. GAMMICK
District Attorney

_____

Deputy District Attorney

Felony Murder Rule

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

FELONY MURDER RULE.

Again, the defense relies upon conjecture and cases from other jurisdictions to support an assertion that the intent to rob only occurred after the murder, thus negating the felony murder rule theory. Pursuant to NRS 200.380, robbery is defined as a taking of personal property from the person of another by means of force or fear if force or fear is used to:

(a) Obtain or retain possession of the property;

(b) Prevent or overcome resistance to the taking; or

(c) Facilitate escape.

The cases relied upon by the defense are not persuasive. In People v. Turner, 789 p.2D 887 (Cal. 1990), the California Supreme Court upheld a conviction for robbery and murder despite the claims by the defendant that he only stole the property of the decedent after he killed him in self defense. Likewise, in People v. Kelly 822 P.2d 385 (Cal. 1992), the Appellate Court stated:

> "Although the evidence was not overwhelming, the jury could also reasonably find defendant intended to steal the rings before he killed her. As we recently noted, "when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery."

822 P.2d 385 at 403.

The other cases cited by the defense fail to lend support for his contentions. Ex parte Sapp, 497 So.2d 550 (Ala. 1986), involved a case where the defendant stole a coat from Walmart, returned to the store 10 minutes later wearing the coat and a fight ensued; State v. Jackson, 596 P.2d 600 (Or. App. 1979), the Oregon statute defining robbery does not contain the clear language contained in NRS 200.380 defining robbery to include force used to prevent or overcome resistance or facilitate escape and is thus easily distinguished; People v. Morris, 756 P.2d 843 (Cal. 1988), there, defendant murdered a person in a bath house and there was no evidence of personal property being taken from the victim; Turner v. McKaskle,

721 F.2d 999 (5th Cir. 1983), involved a case where there was very little evidence to support a conviction and the case is easily distinguished on its facts.

Finally, the defense argues that "the use of force must be shown for the purpose of executing the robbery". This argument is without merit. See Norman v. Sheriff, 92 Nev. 695, 697-98, 558 P.2d 541, 542-43 (1976); Sheriff v. Jefferson, 98 Nev. 392, 649 P.2d 1365 (1982); Leonard v. State, 114 Nev. 1196, 969 P.2d 288, (Nev. 1998).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Faretta

CODE
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Attorney for the Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

JOHN EDWARD HAMILTON,

Defendant.

_____/

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and , Deputy District Attorney, and files this (hereinafter, "Motion"). This Motion is pursuant to Wheby v. State, 95 Nev. 567 (1979)(*overruled on other grounds*, Keys v. State, 104 Nev. 736 (1988)), the attached POINTS AND AUTHORITIES attached hereto and incorporated herein by this reference, and any oral argument deemed necessary by the Court.

Dated this _____ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By:_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

The Nevada Supreme Court has held that a defendant is not entitled to a "hybrid representation" in which he represents himself and has the assistance of counsel. In Wheby v. State, 95 Nev. 567 (1979)(*overruled on other grounds*, Keys v. State, 104 Nev. 736 (1988)) the Court states:

> We have previously determined that although a criminal defendant may have both the right of self representation and a right to assistance of counsel, this does not mean that a defendant is entitled to have his case presented in court both by himself and by counsel acting at the same time or alternatively at the defendant's pleasure. Miller v. State, 86 Nev. 503, 506, 471 P.2d 213 (1970). *Accord*, Layton v. State, 91 Nev. 363, 536 P.2d 85 (1975). We find nothing in Faretta which would require us to alter our analysis of the issue, and we note that in so concluding we are in accord with the federal courts which have considered the question of "hybrid representation" in light of Faretta (citations omitted).

Wheby 95 Nev. at 568-69.

Dated this _____ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Fifth Amendment Violation Voluntary Statement

CODE
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#001510
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

DEFENDANT WAS ADVISED OF HIS MIRANDA RIGHTS IN WRITING, INDICATED AN UNDERSTANDING OF THOSE RIGHTS, VALIDLY WAIVED HIS RIGHTS, AND AGREED TO SPEAK WITH THE POLICE.

Defendant argues that the Miranda warnings administered by the police department were inadequate because he couldn't read the Waiver of Rights form and because the oral warnings were inadequate. Respectfully, defendant's argument is without merit and his Motion to Suppress Statements must be denied.

Defendant was under arrest for firearms and narcotics charges at the time of his interview, and was therefore subjected to a custodial interrogation.

> In Miranda v. Arizona, (citations omitted), the Court established certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation. In now-familiar words, the Court said that the suspect must be told that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (citations omitted). The Court in Miranda "presumed that interrogation in certain custodial circumstances is inherently coercive and...that statements made under those circumstances are inadmissible unless the suspect is specifically warned of his Miranda rights and freely decides to forgo those rights." (citations omitted).

Duckworth v. Eagan, 492 U.S. 195, 201-02 (1989). There are no rigid requirements establishing the precise language to be used in delivering the warnings, "[t]he inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda." Id., at p. 203 (quoting California v. Prysock, 453 U.S. 355, 361 (1981).

The State concedes that Detective's oral admonitions, standing alone, are insufficient Miranda warnings. However, the appropriate analysis reviews the circumstances as a whole, and doesn't

focus on just one area. In addition to Detective DePoali's explanations, Defendant was presented with a written Waiver of Rights that thoroughly set forth Defendant's rights and the effect of waiving those rights. Therefore, the critical issue to be decided is whether or not Defendant understood the written Waiver of Rights presented to him by Detective DePoali.

"[T]he validity of a defendant's waiver of his Fifth Amendment rights after receiving Miranda warnings must be determined in each case by examining the facts and circumstances of the case such as the background, conduct, and experience of the defendant." Falcon v. State, 110 Nev. 530, 534 (1994). In reviewing the totality of the circumstances, "[t]he State must prove by a preponderance of the evidence that the defendant knowingly and intelligently waived his Fifth Amendment rights." Id.

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case...in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

North Carolina v. Butler, 441 U.S. 369, 373 (1979).

THE VIDEOTAPE OF DEFENDANT'S INTERVIEW WITH POLICE UNEQUIVOCALLY ESTABLISHES THAT HIS STATEMENTS WERE MADE VOLUNTARILY, AND ARE ADMISSIBLE.

Before a jury may hear evidence of an admission or confession, the court must decide whether the confession was made "freely and voluntarily." Passama v. State, 103 Nev. 212, 213 (1987). See, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The prosecution must prove by a preponderance of the evidence that a defendant's confession is voluntary before a jury may evaluate the voluntariness of a defendant's confession and what weight to give it." Lego v. Twomey, 404 U.S. 477, 489 (1972).

> To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. The question to be asked in each case is whether the defendant's will was overborne when he confessed. Factors to consider include: the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

Passama, supra, at p. 214. See also, Rowbottom v. State, 105 Nev. 472, 482 (1989). The district court shall look at the "totality of the circumstances" to determine whether a defendant's statement was voluntary or "obtained by physical intimidation or psychological pressure." Thompson v. State, 108 Nev. 749, 753 (1992).

CONCLUSION

DATED this ___ day of January,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Fifth Amendment Violation Non-Miranda Ok for Rebuttal

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. The right of confrontation is applicable to the states. Roberts v. Russell, 392 U.S. 293 (1968); Pointer v. Texas, 380 U.S. 400 (1965). Obviously, a face to face confrontation is the core value of the right. Introduction of a confession of a codefendant implicating another defendant violates a person's right of confrontation when the confessing defendant exercises his Fifth Amendment Right not to testify. A jury instruction telling a jury not to consider the codefendant's confession against another defendant does not cure a confrontation violation. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476 (1968).

However, the use in a joint trial of a confession of a codefendant, who does not testify, which has been edited to remove all reference to the defendant's existence and which becomes incriminatory only through linkage provided by other evidence does not violate the Confrontation Clause so long as the jury is instructed not to use it against the defendant. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In Richardson, a joint murder trial involving Marsh and Evans, a confession of defendant Williams was redacted so as to "omit all reference" to his codefendant, Marsh. The statement did indicate that Williams and a third person had participated in the crime. Id. The redacted confession further indicated that Williams and a third person discussed the murder in the front seat of a car as they traveled to the victims house. There was no indication in the statement that Marsh was in the car. Id. The United States Supreme Court held that: "...the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the codefendants name, but any reference to his or her existence." Id., at p. 211.

The Supreme Court of the United States revisited this issue in Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). Defendants Bell and Gray were indicted for the murder of Stacy Williams and they were tried jointly. Bell confessed to the crime and his confession implicated Gray. A redacted version of the confession was read to the jury by a detective and whenever the name of Gray or a third person appeared the detective said "deleted" or "deletion". The Court held that this confession which substituted blanks and the word "deletion" for Gray's name fell within the protective rule of Bruton. Id. 118 S.Ct. at 1157. The law does not require that statements be redacted so as *not to incriminate inferentially*. In endorsing this concept, the Gray Court stated, "We concede that Richardson placed outside the scope of Bruton's rule those statements that incriminate inferentially." 481 U.S., at p. 208, 107 S.Ct., at pp. 1707-08.

The Ninth Circuit in following the mandates of Gray, has held that a redaction of a statement replacing the codefendant's name with "person X" is also violative of the Bruton rule. United States v. Peterson, 140 F.3d 819, 822 (9th Cir.1998). Likewise, replacing a defendant's name with "someone who worked at FDA ... getting ready to retire" was error pursuant to Bruton. United States v. Gilliam, __ F.3d , 1999 WL 74145, (9th Cir. 1999).

Defendant misreads Gray v. Maryland, supra. Gray does not stand for the proposition that use of a neutral pronoun instead of a defendant's name violates the Confrontation Clause. The violation occurs when the jury can replace blanks or neutral pronouns with the codefendant's name, thus making reference to the other defendant obvious.

Redacted statements are admissible if the redactions are done properly and the Court gives the jury a proper limiting instruction. The rules of redaction set forth in Gray are easily followed in the instant case.

Redactions have been approved (after Gray) using a neutral pronoun or admission that does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant. United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998). In Edwards, the defendants appealed their convictions and life sentences claiming that their Confrontation Clause rights, as defined in Bruton and its progeny, were violated by the government's reliance on testimony by numerous witnesses relating each defendant's out-of-

court admissions of complicity, and by the district court's refusal to grant either their motions for severance or mistrial. In affirming the convictions the Edwards court stated:

> Defendants argue the government's repeated use of out-of-court admissions that "we" or "they" went to the site to steal, and "we" or "they" set the fire, violated Bruton as construed in *Gray*. [footnote omitted] Neither *Richardson* nor *Gray* discussed the admissibility of confessions in which codefendants' names are replaced with a pronoun or similarly neutral word, as in this case. This court and other circuit courts have consistently upheld such evidence **so long as the redacted confession or admission does not facially incriminate or lead the jury directly to a nontestifying declarant's codefendant**. See *United States v. Jones*, 101 F.3d 1263, 1270 & n.5 (8th Cir. 1996) (use of "we" and "they"); *United States v. Williams*, 936 F.2d 698, 700-01 (2d Cir. 1991) ("another guy"); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir. 1990) ("we"); *United States v. Garcia*, 836 F.2d 385, 390-91 (8th Cir.1987)("someone"). We conclude the district court's decision to admit nontestifying defendant admissions, redacted as to codefendants by the use of pronouns and other neutral words, and accompanied by appropriate limiting instructions, was consistent with this court's decisions in *Jones* and *Garcia* and the Supreme Court's recent decision in *Gray*."

Id. 158 F.3d 1117, at pp. 1125-26 (emphasis added).

Dated this _____ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By

Deputy District Attorney

Fifth Amendment Witness Unavailable

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Richard A. Gammick
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO DEFENDANT'S
MOTION TO SUPPRESS STATEMENTS
PURSUANT TO MIRANDA v. ARIZONA

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and DANIEL J. GRECO, Chief Deputy District Attorney, and offers its Response to the Motion to Suppress Statements pursuant to Miranda v. Arizona, filed by defendant. This Response is based upon the following Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

DISCUSSION

As the Court is aware, statements taken in violation of the Fifth Amendment may nonetheless be used in rebuttal to impeach the defendant if the defendant elects to testify at trial. Harris v. New York, 401 U.S. 222, 226 (1971); Oregon v. Hass, 420 U.S. 714, 723 (1975); Richardson v. Marsh, 41 U.S. 200, 206-207 (1987); People v. May, 44 Cal.3d 307 (1988); People v. Baker, 220 Cal.App.3d 574

(1990); People v. Duncan, 204 Cal.App.3d 613, 621 (1988); People v. Peevy, 17 Cal.4th 1184, 1201-1208 (1998).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Grand Jury Notice Requirement

CODE

Richard A. Gammick
#001510
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT PETITION FOR WRIT OF HABEAS CORPUS, AND APPLICATION TO DISPENSE WITH NOTICE REQUIREMENT

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this Opposition to the defendant's Motion for . This Opposition is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Wells argues that his writ should be granted because he did not receive adequate notice of the Grand Jury hearing. However, the State disagrees on two independent grounds.

I. CIRCUMSTANCES EXISTED IN THIS CASE THAT PERMIT THE COURT TO DISPENSE WITH THE STATUTORY NOTICE REQUIREMENT TO DEFENDANT OF THE GRAND JURY PROCEEDING.

While one day's notice has been found unreasonable, there are circumstances where the court can dispense with the requirement of notice to the grand jury target. Sheriff, Humboldt County v. Marcum, 105 Nev. 824 (1989); NRS 172.241. "The district attorney may apply to the court for a determination that adequate cause exists to withhold notice if he:

a. Determines that the notice may result in he flight of the person whose indictment is being considered, on the basis of: ...
b. Outstanding local warrants pending against the person...or
c. Is unable, after reasonable diligence, to notify the person.

NRS 172.241(3).

In this case, two of the factors that allow the court to dispense with the notice requirement exist. As a result, the State requests a hearing to present evidence to establish these facts. Wells may argue that these factors do not apply since he was placed in custody and the District Attorney's Office learned of his whereabouts on September 8th. However, the State's grand jury presentation required testimony from several witnesses, including one from out of state, and the discovery of Wells' incarceration came too late to call off the witnesses without incurring a great expense to the State.

Wells knew of his outstanding arrest warrant and was evading capture prior to his arrest. Ms. Raef had even informed Wells that she would be going to grand jury on him about two weeks before the hearing was conducted. Wells should not be allowed to profit from the circumstances of evading capture that he created.

II. THE DEFENDANT HAS FAILED TO SHOW ANY PREJUDICE TO HIS CASE AS A RESULT OF NOT ACTUALLY RECEIVING NOTICE ONLY ONE DAY BEFORE THE SCHEDULED GRAND JURY HEARING.

In his Petition, the defendant states that Washoe County Jail inmates have telephones in their housing units, but that only collect calls can be made from those phones, unless the caller is contacting the Public Defender's Office. This representation falls short of any further allegation by Wells that he was prevented from taking some sort of action in response to the Marcum notice received on September 8th. The defendant has failed to show any prejudice based on the lack of Marcum notice until only one day before the proceeding.

This particular issue has not yet been addressed by the Nevada Supreme Court. In cases where a defendant raises this issue on appeal, our court has ruled that the defendant is not entitled to relief where he has "failed to show any prejudice resulting from the allegedly inadequate notice." Lisle v. State, 114 Nev.Adv.Op. 27 (February 26, 1998); See, Lisle v. State, 113 Nev.Adv.Op. 56 (April 24, 1997). In cases involving pretrial attacks of alleged lack of grand jury notice to the target, New Mexico requires the defendant "to establish that his missing testimony would have changed the vote of the grand jury on the issue of probable cause." State v. Penner, 671 P.2d 38, 100 N.M. 377 (N.M.App. 1983).

No such offer of proof has been made in this case, and the defendant has failed to even offer that he would have appeared and presented evidence, let alone suggest a change in the outcome of the proceeding. This argument is particularly compelling in this case since Wells knew about the hearing and was purposefully evading capture by the police. His efforts in evading police also resulted in his evading or avoiding his grand jury Marcum notice dated August 26, 1998.

The State respectfully requests an Order from the court finding that adequate cause existed in this case to dispense with the required notice. The State also respectfully requests a finding that the defendant has failed to demonstrate any

prejudice as a result of actually receiving only one day's notice.

DATED this ___ day of _____, 2000.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By

Deputy District Attorney

Guilty Plea Canvas

CODE
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#001510
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The defendant claims that he was not fully informed that his entry of a guilty plea in this case and subsequent conviction would result in his being revoked from his felony probation.

The Supreme Court of Nevada has held that an accepted guilty plea will be considered properly accepted if the Trial Court canvassed the defendant to determine whether he knowingly and intelligently entered the plea. See Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994) and Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990). The Court held in Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986) that the Trial Court must address the defendant personally to determine that he understands the nature of the charge to which he is entering his guilty plea. The Court can recite the elements of the charge or have one of the attorneys do that recitation. Then the Court can elicit a statement from the defendant that he understands the elements of the charge or an admission from the defendant that he committed the offense charged. The Supreme Court of Nevada set out other matters the Trial Court must inquire of the defendant during a guilty plea canvas in Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980). Those matters included advising the defendant that he is giving up certain Federal Constitutional rights including the right against self incrimination, the right to a trial by jury, and the right to confront, that is, to cross examine witnesses against him at that jury trial. Additionally, the Trial Court is to inquire of the defendant that no promises of leniency have been made. That he is pleading guilty because he in fact is guilty of the crime to which he has entered his plea and for no other reason. See also, Stocks v. Warden, Nev. State Prison, 86 Nev. 758, 476 P.2d 469 (1970).

The Supreme Court of Nevada has held that a guilty plea is presumptively valid. The burden is on the defendant to show that it was not entered knowingly and intelligently. See Bryant, cited herein above.

The Supreme Court of Nevada has held that only direct consequences of a guilty plea, such as punishment, are proper matters for the Trial Court's canvas of the defendant. The defendant need not be advised of collateral consequences of his plea, such as in the instant case the effect his guilty plea would have on his felony probation. See generally, Bryant, cited herein above and Anushevitz v. Warden, Nev. State Prison, 86 Nev. 191, 467 P.2d 115 (1970) which held Trial Court had no duty to advise defendant of the prospects for parole during guilty plea canvassing.

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

09211065

Guilty Plea Withdrawal

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

COMES NOW, State of Nevada, by and through RICHARD A. GAMMICK, Washoe County District Attorney, and , Deputy District Attorney, and hereby files its Opposition to Defendant's Motion to Withdraw Guilty Plea. This Opposition is based upon the attached Points and Authorities, all pleadings and papers on file herein and any oral argument which this Court deems appropriate.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF FACTS

ARGUMENT

NRS 176.165 allows a defendant to file a Motion to Withdraw Plea prior to sentencing. Pursuant to case law, a guilty plea is presumptively valid and the burden is on the defendant to show that the denial of a motion to withdraw plea would constitute a clear abuse of discretion. Baal v. State, 106 Nev. 69, 72 (1990)(citation omitted). A guilty plea will be considered properly accepted if the trial court sufficiently canvassed the defendant to determine whether the defendant knowingly and intelligently entered his plea. Id. (citations omitted). In Mitchell v. State, 109 Nev. 137 (1993), the Court defined the appropriate standard of review to be the entire record to determine whether the plea was valid, either by reason of the plea canvas itself or under a totality of the circumstances approach. Id. at 140 (emphasis omitted). Mitchell also restates the holding that "the trial court should view the guilty plea as presumptively valid and the burden should be on the defendant to establish that the plea was not entered knowingly and intelligently." Id. at 140.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny the Defendant's Motion to Withdraw Plea and that the case proceed to sentencing as previously set by this Court.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Habeas Corpus PC Grand Jury

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE EVIDENCE PRESENTED TO THE GRAND JURY ESTABLISHES PROBABLE CAUSE THAT PETITIONERS COMMITTED THE CHARGED OFFENSES.

It is well settled that the District Court's function in reviewing a pretrial writ of habeas corpus challenging the sufficiency of probable cause is to determine whether enough competent evidence was presented to the Grand Jury to establish a reasonable inference that the accused committed the offense(s). State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962). This probable cause standard may be met by the presentation of slight, even marginal, evidence. State v. Boueri, 99 Nev. 790, 795, 672 P.2d 33 (1983). Further, the State is not required to negate the inferences which may tend to explain the conduct of the accused. Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340 (1971).

The legal efficacy of an indictment will be sustained if there has been presented to the Grand Jury the slightest sufficient legal evidence in the best degree, even though inadvertent evidence may also have been adduced. Robertson v. State, 84 Nev. 559, 561, 445 P.2d 352 (1968). Respondent maintains that all testimony evoked by the State in its presentation to the Grand Jury was competent legal evidence. However, assuming arguendo that petitioners were successful in excluding what they claim was inadmissible evidence, there can be no serious question that the Grand Jury transcript still contains ample facts to satisfy NRS 172.155, as interpreted by the aforementioned cases.

MRS 50.265 provides that even a lay witness can relate his opinions or inferences which are rationally based upon his perception and helpful in the determination of a fact in issue. An expert witness may give an opinion or inference upon an ultimate issue to be decided by a trier of fact and may base this opinion or inference upon facts or data which are not otherwise admissible in evidence. See NRS 50.285 and NRS 50.295.

NRS 50.275 authorizes a witness qualified as an expert by special knowledge, skill, experience, training or education to utilize this specialized knowledge when testifying to matters which will assist the trier of fact in understanding the evidence or in determining a fact in issue. In Watson v. State, 94 Nev. 261, 578 P.2d 253 (1978), a police officer's testimony that channel locks are often used by burglars, and that burglars may use socks as gloves to prevent fingerprint impressions was upheld as admissible, expert opinion. The Court determined the evidence was helpful to the trial jury in indicating the possible modus operandi of the burglary. See also, Smith v. State, 100 Nev. 570, 688 P.2d 326 (1984).

In the instant case, gaming control agents were properly qualified as expert witnesses based upon their training, education, knowledge and experience in the field of gaming. Proper expert and non—expert opinions or inferences were rendered by each, and the Grand Jurors were entitled to give whatever credibility they wished to the statements.
Hardison v. State, 84 Nev. 125, 437 P.2d 868 (1968); State v. Johnson, 536 P.2d 295 (Idaho 1975).

Since guilt or innocence is not in issue at Grand Jury proceedings, the District Court review of the transcript does not involve weighing conflicts or disagreements with the testimony. The probable cause finding is satisfied if, from all the evidence, a logical inference can be made that the accused committed the offense(s). State v. Boueri, supra, at page 795. obvious hand signals given to them by the centerfield player.

A. THE GRAND JURY RECEIVED ONLY THE BEST EVIDENCE IN DEGREE. NRS 172.135(2) states:

> The Grand Jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Petitioners contend that the State permitted hearsay and secondary evidence to be presented in lieu of the "best evidence" by permitting gaming agents to testify to what they observed in watching the video tape. The "best evidence" language of MRS 172.135(2) evolves from the Best Evidence

Rule of law which is well recognized as being confined to documentary evidence. Lightford v. Sheriff, 88 Nev. 403, 404, 498 P.2d 1323 (1972). When material terms of the writing are in issue, the rule prohibits the use of parole evidence in lieu of the writing.

This is clearly not applicable to the present situation. The Nevada Supreme Court has repeatedly refused to extend the rule to Grand Jury situations involving alternative methods of proof which are not intended to prove the specific terms of a written document. See Lightford V. Sheriff, supra; Zampanti v. Sheriff, 86 Nev. 651, 653, 473 P.2d 386 (1970) (at Grand Jury proceedings, police officer's opinion testimony identifying marijuana is permitted in lieu of analysis by a qualified chemist).

Habitual Criminal Notice of Intent

CODE

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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

NOTICE OF INTENT TO SEEK HABITUAL CRIMINAL STATUS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK

District Attorney

Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

NOTICE

Please be advised that the State of Nevada is seeking Habitual Criminal Status pursuant to the afore-mentioned provisions of the Nevada Revised Statute. Further, the State is seeking Habitual Criminal Status pursuant to NRS 207.010(1)(d), that is that the defendant has previously been convicted for at least three prior felonies. Those felonies are as follows:

	OFFENSE	ARREST DATE	JURISDICTION
1.			
2.			
3.			
4.			
5.		Instant offense	Reno, NV

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Habitual Criminal Prosecutorial Vindictiveness

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Filing of the Habitual Criminal Charge is the Result of Failed Plea Negotiations, not Prosecutorial Vindictiveness, and is Therefore Constitutional.

The authority cited by defendant in his Motion is limited to three United States Supreme Court cases, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1968); Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098 (1974); and Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663 (1978). Defendant claims these cases stand for the proposition that a defendant does not have to show actual malice by the prosecutor to state a claim for prosecutorial vindictiveness, but need only show that his exercise of an important constitutional right has been "chilled."

Unfortunately for the defendant, these cases cannot be construed so broadly. Rather, Pearce and Blackledge stand for the narrow proposition that a defendant who exercises his right to appeal may not be "punished" by thereafter having to face more serious charges. Most importantly, Bordenkircher held that it is

constitutionally permissible to seek a habitual criminal charge against a defendant who refuses a plea offer.

In Bordenkircher, the defendant was indicted for Uttering a Forged Instrument. 98 S.Ct. at 665. During plea negotiations, the prosecutor offered the following: If defendant pled guilty to the Uttering charge, the prosecutor would recommend a sentence of five years in prison. If defendant refused this offer, the prosecutor would seek to indict him under a habitual criminal statute. Id. The defendant refused the offer and was indicted on the Habitual Criminal charge. Id. Defendant was convicted of both charges and sentenced to life in prison. Id., at 666.

The Court held that defendant's constitutional rights were not violated by this course of events. Id., at 669. The Court stated the prosecutor simply "presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution." Id. See also United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485 (1982). (No presumption of vindictiveness where prosecutor files more serious charges when defendant refuses plea offer).

Defendant does not dispute that he is subject to prosecution as a habitual criminal. Accordingly, Bordenkircher is directly on point with the case at bar and defendant has completely failed to distinguish it.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Habitual Criminal Sentencing Memorandum

CODE 1960
Richard A. Gammick
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

SENTENCING MEMORANDUM

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney of Washoe County and , Deputy District Attorney and hereby submits a Memorandum of Law for the sentencing hearing of the defendant scheduled for

This Memorandum is based on the attached Points and Authorities, all pleadings and papers on file herein and any

testimony taken and documents admitted at a hearing on this matter. DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

II. ARGUMENT

Our law requires that a separate count be filed when alleging and requesting an adjudication of Habitual Criminal status when an Information is filed. Accord, Howard v. State, 83 Nev. 53, 56, 422 P.2d 548, 550 (1967).[1] NRS 207.010(2) states:

> "It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found. The trial judge may at his (sic) discretion, dismiss a count under this section which is included in any indictment or information."

After notice is filed, the court's task is to then conduct a hearing on the allegation of Habitual Criminal.[2] This hearing involves several concomitant components.

First, the court is to weigh the appropriate factors for and against the habitual criminal enhancement.[3] Clark v. State, 109 Nev. 426, 851 P.2d 426 (1993). The purpose behind habitual criminal status is to increase sanctions for the recidivist and to discourage repeat offenders. Odoms v. State, 102 Nev. 27, 32, 714 P.2d 568, 571 (1986). If the court does not find that it would be "just and proper" for the

---

[1]See, McGervey v. State, 114 Nev.Adv.Op 56, at 5, 958 P.2d 1203, 1207 (1998) where the defendant was charged with being a habitual criminal by Amended Information. See also, Parkerson v. State, 100 Nev. 222, 224, 678 P.2d 1155, 1156 (1984), where the court stated that the habitual criminal allegation "...is typically included in the charging document..." The purpose of such a pleading is to provide notice of the State's allegation, not to charge a crime, therefore, no right to jury trial on the allegation exists. Accord, Hollander v. Warden, Nev. State Prison, 86 Nev. 369, 468 P.2d 990 (1970).

[2]"One facing adjudication as a habitual criminal...is at the mercy of the court and is thus subject to *the broadest kind of judicial discretion*." Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997), citing Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). [Emphasis in original].

[3]"NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court." Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996), citing Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

application of the habitual criminal status, it may dismiss the count. Clark, supra, Nev. at 428. The court has the discretion to dismiss the count "where an adjudication of habitual criminality would not serve the purposes of the status or interests of justice." Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990) citing French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982).

Second, the court must be satisfied beyond a reasonable doubt of the identity of the person and conviction of prior felonies as proved by the State. Howard, supra. A certified copy of a prior conviction is prima facie evidence for a prior felony alleged in the notice. Id., Nev. at 57.

Third, the court should examine the proof of each of the prior felony convictions pled that support the habitual criminal allegation for constitutional muster.[4] McAnulty v. State, 108 Nev. 179, 181, 826 P.2d 567, 569 (1992); Crutcher v. District Court, 111 Nev. 1286, 903 P.2d 823 (1995). Namely, "...there must be an affirmative showing that the defendant was represented by counsel, or knowingly waived that right in the prior felony proceedings." Burns v. State, 88 Nev. 215, 220, 495 P.2d 602, 605, (1972), citing Hamlet v. State, 85 Nev. 385, 387, 455 P.2d 915, 916 (1969).

If the court makes a finding that it would be just and proper for the defendant to be adjudicated as a habitual criminal; and that the State has established identity; and that the statutory number of prior felonies have been noticed, proved by the State and are constitutionally valid, the court then invokes the recidivist statute. The court then has the option of applying either the "major habitual criminal statute" or the "little habitual criminal statute" if the circumstances so warrant. Staley v. State, 106 Nev. 75, 78, 787 P.2d 396, 398 (1990). Thereafter, the appropriate recidivist sentence is imposed in lieu of the otherwise appropriate term by the ordinary statutory sentencing scheme.[5] Staude v. State, 112 Nev. 1, 7,

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[4]The court can consider a defendant's stipulation that he was convicted of prior felonies pled by the State as going to overall proof of identity and the fact of conviction, as the defendant stipulated here in the hearing of July 7, 1999. However, the court must nonetheless examine the documentation of prior felony convictions for their constitutional validity; similar to the scrutiny protocol for documents offered to enhance a DUI penalty.

[5]Should the court so adjudicate the defendant and sentence him in the instant case under this section, the court will then be called upon to sentence the defendant to the ordinary statutory sentencing scheme in the two companion cases.

908 P.2d 1373, 1377 (1996), citing Cohen v. State, 97 Nev. 166, 625 P.2d 1170 (1981); Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966).

III. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Handwriting Exemplar Motion to Seize

CODE
Richard A. Gammick
#001510
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Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TO SEIZE DEFENDANT'S HANDWRITING EXEMPLAR

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Handwriting exemplars do not involve a Fourth Amendment seizure anymore than a subpoena would, and therefore the Government is under no obligation to make a preliminary showing of reasonableness. United States v. Mara, 410 U.S. 19, 93 S.Ct. 774 (1973).

A handwriting exemplar also is not entitled to Fifth Amendment protection because it is non-testimonial in nature, so long as it is specifically utilized for non-content analysis. Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967). The taking of a handwriting exemplar has been deemed not to be a critical stage of the criminal proceedings and thus there is no Sixth Amendment protection either. State v. Lanning, 109 Nevada 1198 (1993).

Like the voice or body itself, a handwriting exemplar is an identifying physical characteristic outside constitutional protection. U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967); Gilbert v. California, supra. See also, Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990) (slurred nature of speech is non-testimonial); U.S. v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973) (voice exemplar

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Handwriting Exemplar Order to Seize

CODE 3370
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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ORDER TO SEIZE DEFENDANT'S HANDWRITING EXEMPLAR

Based upon motion of plaintiff and good cause appearing;

IT IS HEREBY ORDERED that defendant, , shall provide to law enforcement officers or other agents representing plaintiff in this matter, a true and accurate sample of his handwriting for evidentiary comparison purposes.

IT IS FURTHER ORDERED that defense counsel shall be permitted to be present during the taking of said handwriting sample. If defendant, , should resist or intentionally avoid giving a true and accurate sample, this Court will consider remedies including the admission at trial of evidence proffered by the State for comparison purposes.

Dated this _____ day of _____, .

_____
DISTRICT JUDGE

Handwriting Non-Testimonial

CODE

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(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Handwriting exemplars do not involve a Fourth Amendment seizure anymore than a subpoena would, and therefore the Government is under no obligation even to make a preliminary showing of reasonableness. United States v. Mara, 410 U.S. 19, 93 S.Ct. 774 (1973).

A handwriting exemplar also is not entitled to Fifth Amendment protection because it is non-testimonial in nature, so long as it is specifically utilized for non-content analysis. Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967). The taking of a handwriting exemplar has been deemed not to be a critical stage of the criminal proceedings and thus there is no Sixth Amendment protection either. State v. Lanning, 109 Nevada 1198 (1993).

Like the voice or body itself, a handwriting exemplar is an identifying physical characteristic outside constitutional protection. U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967); Gilbert v. California, supra. See also, Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990) (slurred nature of speech is non-testimonial); U.S. v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973) (voice exemplar).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Hearsay Co-conspirator Admissibility

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

It is well settled that hearsay statements may be admitted into evidence where the statement is made by a co-conspirator of a party during the course and furtherance of a conspiracy. Goldsmith v. Sheriff, 85 Nev. 295, 454 P.2d 86 (1969). As a prerequisite to the application of the "statements of co-conspirators, exception to the hearsay rule, it must be determined by reference to independent evidence that a conspiracy existed. Fish v. State, 92 Nev. 272, 275, 549 P.2d 338, 340 (1976). The amount of independent evidence necessary to prove the existence of a conspiracy may be slight, it is enough that only prima facie evidence of the fact is produced. Id.

A case lending guidance to the Court on the issue of the admissibility of the co-conspirator statements is McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987). In that case, McDowell was tried with his co-conspirators and found guilty of two counts of Murder With the Use of a Deadly Weapon, one count of Robbery With the Use or a Deadly Weapon, and three counts of Conspiracy. The most damaging evidence against McDowell admitted at the trial were various co-conspirator out-of-court declarations. In determining the admissibility of the extra-judicial statements, the District Court properly found the existence of a conspiracy by "slight evidence" as required in Nevada. Citing Fish v. State supra. Once the Court had found the existence of a conspiracy for purposes of NRS 51.035(3)(e) the admission of the co-conspirator's statement was proper. In McDowell, the Nevada Supreme Court went on to state: According to NRS 51.035(3)(e), an out-of-court statement of a co-conspirator made during the course and in furtherance of the conspiracy is admissible as non-hearsay against another co-conspirator. Pursuant to this statute, it is necessary that the co-conspirator who uttered the statement be a member of the conspiracy at the time the statement was made. It does not require the co-conspirator against whom the statement is

offered to have been a member at the time the statement was made." McDowell v. State, 103 Nev. 527, 529, 530.

The Nevada Supreme Court also addressed the confrontation clause and its application to NRS 51.035(3)(e) when it stated: The Federal position is consistent with our interpretation. In construing Federal Rule of Evidence 801(D)(2) (capitally), which is analogous to NRS 51.035(3)(e), the Federal courts have consistently held that extra-judicial statements made by one co-conspirator during the conspiracy are admissible, without violation of the confrontation clause, against the co-conspirator who entered the conspiracy after the statements were made. See U.S. v. Gypsum, 333 U.S. 364, 68 S.Ct. 525, 92, L.Ed 746 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir. 1987). Id.

The Court went on to state in McDowell that it was not necessary for the District Court to explicitly rule as to the time when McDowell entered the conspiracy, and hence the Nevada Supreme Court declined to require such a ruling. Simply by joining the conspiracy McDowell had implicitly adopted all of his fellow co-conspirators prior acts and declarations in furtherance of the conspiracy. McDowell, 103 Nev. at 530.

A recent case addressing the existence of a conspiracy is Marlo Thomas v. State of Nevada, 114 Nev. Adv. Op. 122 (Nov. 1988). In Thomas, the defendant challenged the sufficiency of the evidence with respect to a conviction for conspiracy to commit murder and/or robbery. In that case, the Supreme Court stated:

> Conspiracy is an agreement between two or more persons for an unlawful purposes. Doyle, 112 Nev. at 894, 921 P.2d at 911. "Conspiracy is seldom susceptible as direct proof and is usually established by inference from the conduct of the parties." Gator v. State, 106 Nev. 785, 790 Note 1, 801 P.2d 1372, 1376 Note 1 (1990) (Quoting State v. Dressel, 513 P.2d 187, 188 (NM 1973)), overruled on other grounds, Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993). Therefore, if "a coordinated series of acts" furthering the underlying offense is "sufficient to infer the existence of an agreement," then sufficient evidence exists to support a conspiracy conviction. Id.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Hearsay Exception Recent Fabrication

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

POINTS AND AUTHORITIES IN SUPPORT OF ADMISSION

OF CERTAIN RECORDED STATEMENTS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and offers its Points and Authorities in Support of Admission of Certain Recorded Statements. This brief is supported by the accompanying legal analysis, all papers on file, as well as evidence and arguments previously made before the court.

DATED this ____ day of September, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

The admissibility of certain recorded statements after cross-examination of the State's witnesses is controlled by NRS 51.035(2)(b) and NRS 47.120. A prior statement is not hearsay if made by a witness subject to cross-examination, and the statement is "consistent with his testimony and offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." NRS 51.035(2)(b). Additionally, "when any part of a writing or recorded statement is introduced by a party, he may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts." NRS 47.120(1).

This issue has been previously addressed by the Nevada Supreme Court. In the murder case of Crew v. State, 100 Nev. 38, 44 (1984), the State relied heavily on the testimony of a cellmate, Dowell. Dowell was also being held on the charge of murder and was approached by law enforcement and asked if the defendant had made any incriminating statements. Dowell worked out a plea bargain for a reduced charge and gave a statement.

> On cross-examination of Dowell, defense counsel read from the statement, pointing out discrepancies between it and Dowell's testimony. At the conclusion of Dowell's testimony, defense counsel put Dowell's attorney on the stand to testify regarding Dowell's arrangement with the prosecution. At that time, the trial court granted the prosecution's motion to admit the statement into evidence "for the purpose of there being any inconsistencies that might have been alluded to by counsel." Appellant maintains that the statement constitutes inadmissible hearsay.
>
> To be admissible under NRS 51.035(2)(b), prior consistent statements must have been made at a time when the declarant had no motive to fabricate. Daly v. State, 99 Nev.564, 665 P.2d 798 (1983); Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981). Since at the time Dowell made his statement his arrangement with the police had yet to be consummated, he clearly had a motive to fabricate. We hold, however, that the statement was properly admitted to rehabilitate Dowell's testimony. Since defense counsel read from the statement to attack Dowell's testimony, the prosecution was entitled to introduce the statement into evidence to clarify the inconsistencies pointed out by counsel. See, United States v. Baron, 602 F.2d 1248 (7th Cir. 1979); NRS 47.,120. As in Baron, most of Dowell's testimony was consistent

> with the statement; the inconsistencies went only to details. Appellant cannot be permitted to use parts of a prior statement to impeach the declarant's testimony and then to withhold that same statement from the jury on grounds of unreliability.

Id., at 44-45. For the same result reached, see, United States v. Lujan, 936 F.2d 406, 410-11 (9th Cir. 1991); United States v. Stuart, 718 F.2d 931, 934-35 (9th Cir. 1983); United States v. Allen, 579 F.2d 531, 532-33 (9th Cir. 1978); and United States v. Rinn, 586 F.2d 113, 119-20 (9th Cir. 1978).

Cases have been reversed where the court allowed the State to admit a prior consistent statement and the State failed to show that a declarant had no motive to fabricate. See, Gibbons and Daly, supra. However, if the motive to fabricate could have arguably arisen at two different points in time, and the prior consistent statement was made prior to at least one of the possible motives to fabricate, then the court properly admitted the prior consistent statement to the jury. Cunningham v. State, 100 Nev. 396, 398-99 (1984). See, United States v. Baron, 602 F.2d 1248, 1250-53 (7th Cir. 1979).

In this case, the State's witnesses were cross-examined extensively about prior statements and plea negotiations struck in their own cases. The prior statements were recorded at a time when the witnesses did not have a motive to fabricate since they were made prior to or independent of any negotiations struck in exchange for their cooperation in this case. As a result, the prior recorded statements are admissible.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Hearsay Exception Excited Utterance

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Is the victim's statements made to the deputy sheriff six hours later regarding how she obtained her injury and excited utterance exception to the hearsay rule?

There are several cases in which Courts have determined what is an excited utterance. All agree that the inquiry should be taken on a factual basis.

In Guthrie v. U.S., 207 F.2d 19, (C.A.D.C. 1953), the fact that eleven hours had passed before the utterance was made and the fact that the utterance was in response to a question was of no moment to the Court.

> At page 25 the Court writes,
>
> It is impossible to formulate a hard and fast rule for determining whether the declaration of a victim of violence is admissible as a spontaneous utterance, that is, whether it was made during a period of nervous stress and shock caused by physical violence when the victim is presumed to be incapable of artifice or premeditation to serve his own interests. The fact that the statement is an answer to a question is not fatal to spontaneity. In Beausoliel v. United States, 1939, 71 App.D.C. 111, 113-114, 107 F.2d 292, 294-295, we said:
>
> Declarations, exclamations and remarks made by the victim of a crime after the time of its occurrence are sometimes admissible upon the theory that 'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy * * * .' (3 Wigmore, Evidence § 1747 (2d ed. 1923).)
>
> What constitutes a spontaneous utterance such as will bring it within this exception to the hearsay rule must depend, necessarily, upon the

> facts peculiar to each case, and be determined by the exercise of sound judicial discretion, which should not be disturbed on appeal unless clearly erroneous**.**
>
> [92 U.S.App.D.C. 365] 'That the statements in the present case were made in response to inquiry is not decisive of the question of spontaneity, as appellant contends, although that fact is entitled to consideration. Likewise, while the time element is important, it is not in itself controlling. 'Indeed, as has been well asserted, no inflexible rule as to the length of interval between the act charged against the accused and the declaration of the complaining party, can be laid down as established."

In McQueen v. U.S.,262 F.2d 455,(C.A.D.C. 1958) in a PER CURIAM

opinion at page 456 the same Court ruled,

> Appellant McQueen was indicted, tried and convicted for robbery. At about three o'clock one morning two police officers heard shots and ran to the scene. They saw a man (later identified as 'Lee Bong') in a yard waving a pistol and yelling, 'You robbed me; you robbed me.' The officers saw McQueen leaving a shed in the yard. Later they found a wallet in a trash can beside the shed. Lee Bong identified it as his. While still on the scene McQueen admitted his guilt to the offense. Lee Bong died of a heart attack shortly after this affair and so was not a witness at the trial. Upon this appeal counsel for McQueen raises several points about the admissibility of evidence, particularly with regard to the officers' testimony concerning Lee Bong's utterances on the scene. We find no error. (Footnote omitted).
>
> Affirmed.

Thus, the fact that an officer is the one that hears the statement is of no moment.

Next, in Baber v. U.S., 324 F.2d 390, (C.A.D.C. 1963) in a rape case, the witness (who was available) testified what happened, then her father testified what the victim told him had just happened and then the policeman testified about what she had recounted to the him sometime later. Both the victim's statement and her father's statement came in as spontaneous utterances. The statements made to the police were viewed as hearsay without an exception but viewed as cumulative and as harmless error because it was consistent with what the victim had said and what the father had said.

At page 394, the Court determined relative to the statement to the police officer some 25 minutes later that,

> Even on the assumption that the testimony should not have been admitted as a spontaneous declaration, we do not believe that reversible error occurred in this connection. The hearsay rule is primarily designed to exclude testimony of extra-judicial declarations when those

> declarations are introduced for the purpose of proving the truth of their content. In this case, however, the testimony of the police officers was merely cumulative for that purpose, since the story had already been fully related to the jury by the complaining witness and by the father in his account of her spontaneous declaration immediately after the culprit had fled. The complaining witness was of course seen and heard by the jury and was cross-examined as to her story. We are convinced that no error affecting substantial rights occurred as a result of the admission of the policemen's testimony.

Turning now to this jurisdiction, the Nevada Supreme Court has spoken on this issue as well. In Dearing v. State, 691 P.2d 419, 100 Nev. 590, (Nev. 1984) in a PER CURIAM opinion the Court said:

> This is an appeal from a judgment of conviction upon a jury verdict of one count of sexual assault and one count of lewdness with a minor. For the reasons expressed below, we affirm the conviction.
>
> Appellant raises several assignments of error in this appeal. The only issue requiring discussion, however, is appellant's [100 Nev. 592] assertion that the testimony of three witnesses was erroneously admitted over hearsay objections.
>
> The first such item of testimony was given by the victim's father, and consisted essentially of his repetition of the victim's description of the assault. The victim's recitation occurred only minutes after the attack, and the father's conversation with the victim was prompted by his observation that she was "agitated and nervous." Accordingly, the testimony was properly received as an excited utterance. NRS 51.095; United States v. Nick, 604 F.2d 1199 (9th Cir.1979); see generally C. McCormick, McCormick on Evidence Sec. 297 (3d ed. 1984). It is of no import that the district court gave a different reason for admitting the testimony, even if that reason was incorrect. See Cunningham v. State, 100 Nev. --- n. 1, 683 P.2d 500 (1984).
>
> The second item of testimony objected to was that of a police detective who interviewed the victim about one and one-half hours later. The testimony was substantively similar to that of the victim's father. Again, however, the victim was at that time "nervous and upset," and the time between the event and the statement was relatively short. Accordingly, in light of the authorities cited above, the testimony was properly
> admitted despite the district court's apparent reliance upon a different rationale.
>
> The third item of testimony was that of the victim's mother, during which she repeated the victim's description of the attack. We note that appellant's trial counsel cross-examined the child witness at considerable length with the apparent intention of implying that the child's credibility was questionable. Although counsel did not suggest any specific motive for fabrication or indicate where or when such a

> motive might have arisen, counsel's heavy cross-examination of the victim was directed at impugning her credibility. In light of the heavy cross-examination, the state attempted to rehabilitate the victim's credibility by offering prior consistent statements which the victim had made to her mother just a few days after the attack.
>
> We conclude that the district court did not abuse its discretion by admitting the mother's testimony regarding the prior consistent statements. See State v. Pitts, 62 Wash.2d 294, 382 P.2d 508 (1963). As the court states in Pitts: "Repetition adds stature to imputations and insinuations and may well infer recent fabrication. The trial court saw and heard the live performance; it was in a position to [100 Nev. 593] weigh any innuendoes and nuances, and it admitted [the prior consistent statement] for the limited purpose stated." Id. 382 P.2d at 510-11. Given the circumstances of the present case, we cannot say that the district court erred in allowing the mother to testify regarding statements made by the child, which rebutted the implication of fabrication raised by defense counsel. Cf. Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981) (where the defense suggests a motive to fabricate, corroborative testimony introduced for the purpose of rehabilitation must affirmatively show that the repeated statement was originally made at a time when the declarant had no motive to fabricate); see also NRS 51.035(2)(b).
>
> Further, in Hogan v. State, 732 P.2d 422, 103 Nev. 21,(Nev. 1987)

at 425 in a PER CURIAM opinion, the Court stated,

> Second, hearsay testimony that Hogan had threatened to kill Ms. Hinkley was admissible under NRS 51.095, the "excited utterance" exception to the hearsay rule. Two witnesses testified that the victim told them Hogan had threatened to kill her. One statement came just after the threat; the other, approximately an hour later. In each case, Ms. Hinkley was frightened, shaking, nervous and crying. Thus, the court did not err in finding the statements admissible, see Dearing v. State, 100 Nev. 590, 691 P.2d 419 (1984).
>
> Most recently, in Felix v. State, 849 P.2d 220, 109 Nev. 151, (Nev. 1993) the Nevada

Supreme Court has articulated this rule about hearsay evidence,

> To find hearsay statement reliable, court must examine totality of circumstances surrounding statement and find that declarant was particularly likely to be telling truth when statement was made, statement was at least as reliable as evidence admitted under any of the accepted hearsay exceptions, and statement was so trustworthy that adversarial questioning would add little to its reliability. U.S.C.A. Const.Amend. 6; N.R.S. 51.385.

Thus, the import of all of these cases is that it is well within the trial court's discretion as to whether or not a statement made is within the excited utterance exception. Depending on the facts of the case, a statement can be viewed as excited if given even 11 hours later.

It is well established that excited utterances do not violate the Sixth Amendment's Confrontation Clause. In Puleio v. Vose, 830 F. 2d 77 (1st Cir. 1987), that Court said that

> the hearsay exception to excited utterances is firmly rooted in the hearsay exception and entails no denial of confrontation rights even if the declarant is unavailable. The court must make a preliminary factual determination that the statement at issue falls within the hearsay exception before allowing it into evidence.

Furthermore, the Nevada Supreme Court has said that errors concerning hearsay and confrontation clause of U.S. 6th amendment are subject to harmless error analysis. (See NRS 51.035 and 51.065.) Franco v. State, 109 Nev. 1229, 266 P.2d 247 (1993).

The United States Supreme Court has stated, in general, that:

> testimonial privileges contravene the fundamental principle that the public has a right to every man's evidence. Therefore, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding the relevant evidence has a public good which transcends the normal predominant principle of utilizing all rational means of ascertainment of the truth. (See, *Trammel v. United States,* 445 U.S. 40 (1980).

With this in mind, it must be asked, who holds the privilege? Clearly, the patient holds the privilege as does the physician on the patient's behalf. (See NRS 49.215 to 49.245, inclusive).

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Hearsay State of Mind Admissibility

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The State seeks admissibility of the proffered testimony on the grounds that it is relevant to prove one of the elements of the count of Possession of Stolen Property concerning the Zenith brand television set. That element is that the defendant knew that this property was obtained by means of larceny or under such circumstances that as should have caused a reasonable person to know such goods were so obtained.

The State respectfully contends that the proffered testimony is admissible under two exceptions to the hearsay prohibition of NRS 51.065. Those exceptions are NRS 51.105, Then existing mental, emotional, or physical condition, and NRS 51.345, Statement against interest.

1. NRS 51.105, Then existing mental, emotional, or physical conditions. This statute states in pertinent part: 1. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule. The Supreme Court of Nevada addressed this issue in Beddow v. State, 93 Nev. 619, 572 P.2d 526 (1977). In that case, officers of the Las Vegas Metropolitan Police Department were called to a residential mobile home park on a civil disturbance report. Upon arrival officers met the complaining party who was a neighbor of the defendant's. This party told officers that the defendant was intoxicated and possibly had a revolver in his possession. Acting on this information, officers went to the defendant's mobile home. The defendant, who was inside his mobile home, was drinking a beer and had a pistol visible in his waist band. Officers told him to keep his hands at his side. The defendant stepped toward the door of his residence. As he did so, officers could no longer see his revolver, and at the same time the defendant moved his hand around his back. Fearing for their safety and that of the defendant,

officers entered his residence and tried to disarm him. The defendant resisted their attempts to disarm him and to place him under arrest. He was charged with obstructing and resisting officers in the performance of their duties. At trial, the court allowed the officers to testify to the statements made by the neighbor to the officers to the effect that the defendant was intoxicated and possibly had a revolver. The Supreme Court upheld the trial court in this regard. The Supreme Court found the neighbor's statements to officers to be hearsay as it was an out of court statement offered to prove the matter asserted. However, the Court went on to find that one of the issues at trial was how the officers reacted to the defendant when he refused to keep his arms at his side and away from the revolver. Therefore, the Court held that the statements by the neighbor to officers were admissible under NRS 51.105. The Court stated:

> Whenever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned.

See, Beddow, 93 Nev. at page 623, 572 P.2d at page 529. The Court went on to state, "(A)s the officers' response to this behavior was an issue, the testimony of the officers concerning the neighbor's statements was, as an exception to the hearsay

rule, relevant to evidence of their then existing states of mind." Again see, Beddow, 93 Nev. at page 624, 572 P.2d 529.

Additionally, in Beddow, the trial court gave a limiting instruction limiting the jury's use of the neighbor's statements to evaluating the officers' state of mind when they entered the defendant's residence. In the instant case, should this Honorable Court rule the proffered testimony admissible, a similar limiting instruction could be given to the jury.

The Court reaffirmed its holding in this regard in Cunningham v. State, 113 Nev. 897, 944 P.2d 261 (1997) and Wallach v. State, 106 Nev. 470, 796 P.2d 224 (1990). The Court held in both cases that "...if a statement was merely offered to show that the statement was made and the listener was affected by it, then the statement was not offered for the truth and is admissible as non-hearsay." See Cunningham, 944 P.2d 266 and Wallach, 106 Nev. at page 473 and 796 P.2d at page 227.

Therefore, the State respectfully requests that this Honorable Court find that the proffered testimony is admissible based on the argument made herein under the provisions of NRS 51.105.

IV. CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Hot Pursuit Warrantless Arrest

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

A. Trooper did not need a warrant to arrest the Defendant, nor did he need a warrant to enter the Defendant's garage in order to arrest the Defendant based on U.S. v. Santana.

A warrant to arrest the Defendant was not necessary under NRS 171.136, which allows an officer to arrest an individual, without a warrant, if the offense committed is a misdemeanor and it is committed in the arresting officer's presence[6]. In this case, the Trooper initiated the stop due to the fact he witnessed the Defendant tailgating a Harley Davidson motorcycle on northbound U.S. 395. Tailgating or following too closely is a violation of NRS 484.307. All traffic offenses in Nevada are misdemeanors pursuant to NRS 193.170. Therefore, Trooper O'Rourke had probable cause to stop and arrest the Defendant without a warrant because she was committing a misdemeanor, following too closely,; in a public place, on public highway U.S. 395,; while in his presence, the Trooper personally observed the violation.

The next logical question in the analysis is whether the Defendant can avoid being arrested without a warrant by escaping into her garage. The Supreme Court of the United States in United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406 (1976) squarely addressed this issue and concluded a defendant could not thwart an otherwise lawful arrest that had been set in motion in a public place by retreating into her home. Santana 427 *U.S.* at 43.

---

[6] A warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820 (1976).

In Santana, the police had probable cause to believe the Defendant participated in a drug transaction with an undercover officer. Id. at 40-42. The defendant was standing in the doorway of her house when the police pulled up to the residence, approximately 15 feet from the defendant. Id. The police exited their vehicles while shouting, "police" and displaying their badges. Id. Upon seeing the officers, the defendant retreated into her home. Id. The police followed the defendant inside the home and arrested her. Id.

The Supreme Court concluded the police initially decided to arrest the defendant while she was standing in the doorway and that by standing in the doorway she was in a public place. Id. **"We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place."** *Id.* at 43 (emphasis added). The Court ruled the officers entry into the home without a warrant did not violate the Fourth Amendment.

The rule announced in *Santana*, is dispositive of the issue in this case.

The Defendant states in his motion, "The court stated that it would be hard to ever justify warrantless police entry into a home unless a serious crime is involved. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091(1984)." However, the Defendant failed to recognize the Court in *Welsh* listed the "few in number and carefully delineated" exceptions to the warrant requirement, which specifically included its opinion in Santana. Welsh 466 U.S. at 465.

Thus, under the Supreme Court rule announced in Santana, Trooper , acted properly and did not violate the Defendant's Fourth Amendment rights.

B. The Supreme Court Rule announced in Santana applies equally to misdemeanors and felonies.

The rule announced by the Supreme Court in Santana, logically applies to misdemeanors and felonies alike. An arrest which has been set in motion in a public place, cannot be defeated by the defendant retreating to a private place. Santana at 43. While the defendant in Santana was suspected of committing a felony offense when arrested, the Supreme Court did not limit its holding only to felonies.

Neither the seriousness of the crime nor how the crime was classified entered into the Court's analysis in finding a defendant cannot use his house to shield an otherwise proper arrest. The courts which have addressed this issue weigh heavily against interpreting Santana to apply only to felonies, including the Nevada Supreme Court. In Edwards v. State, 107 Nev. 150, 808 P.2d 528 (1991), the Nevada Supreme Court applied the rule in Santana to a case involving a gross misdemeanor. California has expressly ruled Santana applies to misdemeanors. *People v. Lloyd,* 216 Cal.App.3d 1425, 265 Cal.Rptr.2d. 422 (1989); In re Lavoyne M., 221 Cal.App.3d. 154, 270 Cal.Rptr.2d. 394 (1990). The Ninth Circuit Court of Appeal also applied Santana to case involving a misdemeanor. *United States v. Patch*, 114 F.3d 131 (C.A.9 (Ariz.) 1997).

C. Trooper warrantless entry into the Defendant's garage and subsequent arrest of the Defendant is lawful under the "hot pursuit" and exigent circumstances exceptions to the Fourth Amendment warrant requirement.

The State recognizes that the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment prohibits police from making warrantless and nonconsensual entry into a defendant's home in order to make routine felony arrests. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980). The Supreme Court through a series of decisions have laid out "exigent circumstance" exceptions which can justify a warrantless entry into a defendant's home and thus not violate the Fourth Amendment warrant requirement.

Preventing the destruction of evidence[7] and hot pursuit[8] are the two exigent circumstances exceptions which apply to the facts of this case.

Hot pursuit is defined as, "some sort of chase, but which need not be an extended hue and cry in and about the public streets." Santana at 42,43. The Defendant in this case led Trooper O'Rourke on a two to three mile chase in and about the public streets of Washoe County. Thus the Trooper was in hot

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[7] See *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826 (1966).

[8] See *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642 (1976).

pursuit of the Defendant when he entered her garage and his conduct falls within the hot pursuit exception excusing the Fourth Amendment warrant requirement.

The Defendant contends the hot pursuit exception does not apply to misdemeanors and cites Welsh. However Welsh is distinguishable from the facts in this case. First the Court in *Welsh* refused to analyze the case under the hot pursuit exception because Wisconsin categorized the offense committed as a civil or minor offense. The Court in Welsh, reasoned a finding of exigent circumstances sufficient to justify a warrantless entry into a person's residence should be strictly limited when only a minor offense was committed. Welsh 466 U.S. at 750. In analyzing whether an offense was minor the Court looked to the potential sentence a person could receive for that offense. Id. at 754. The offense committed by defendant in Welsh, the Court concluded was minor and civil in nature because the defendant could not receive any jail time and could only receive a $200 fine. *Id.* However, the offenses committed in this case, following too close[9] and driving under the influence[10] are both criminal offenses for which a person may serve up to six months in the Washoe County Jail.

Additionally, the Court determined there was not a true hot pursuit in Welsh because there was no immediate or continuous pursuit of the defendant from the scene of the crime. *Id.* at 753. The same conclusion cannot be reached on the facts of this case, since the Trooper followed directly behind the Defendant with his emergency lights and sirens activated continuously for more than two miles over four different public roads.

The Defendant in this case is charged with three counts of driving under the influence of alcohol, (hereafter DUI). In proving a DUI case, one of the many pieces of evidence the State relies on is the result of the defendant's evidentiary blood or breath test which indicates the alcohol content of the defendant's blood or breath. From the time alcohol is consumed the human body is working to break down the substance and expel it from the body. It is logical to infer that once the Defendant stopped her vehicle and had contact with the Trooper he would have probable cause to arrest her for DUI, which is what

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[9] NRS 193.170 & 193.120.

[10] NRS 484.379 & 484.3792.

happened in this case. Probable cause would be based on her physical signs of intoxication, performance on the field sobriety tests and driving pattern. After the arrest she would be required under 484.383 to submit to an evidentiary test to measure the alcohol content of her blood or breath. Thus any delay in arresting the Defendant would allow her body to break down the alcohol and result in the destruction of evidence.

CONCLUSION

Illegal Sentence Contesting Sufficiency of Evidence by Motion

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE DEFENDANT CANNOT CONTEST THE SUFFICIENCY OF THE EVIDENCE UTILIZING A MOTION FOR ILLEGAL SENTENCE

An "illegal sentence" for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as "one 'at variance with the controlling sentencing statute,' or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided...." Allen v. United States, 495 A.2d 1145, 1149 (D.C.1985) (quoting Prince v. United States, 432 A.2d 720, 721 (D.C.1981) and Robinson v. United States, 454 A.2d 810, 813 (D.C.1982)). A motion to correct an illegal sentence "presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence." Id. A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot, however, be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing. Issues concerning the validity of a conviction or sentence, except as detailed in this opinion, must be raised in habeas proceedings. NRS 34.724(2)(b); see State v. Meier, 440 N.W.2d 700, 703 (N.D.1989)

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Immunity Diplomatic

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

This Court ordered that the litigants prepare legal briefs as to whether this Court has jurisdiction over the defendant who is asserting some generalized diplomatic immunity. The material delivered by the defendant to the State is a rambling, and at times, incoherent historical presentation regarding the claimed sovereign of "Nigritia." Unfortunately for the defendant, the materials are completely devoid of any legal basis to assert that this Court does not have jurisdiction over the defendant. The United States Supreme Court in Boos v. Berry, 485 U.S. 312, 108 S.Ct.Rptr. 1157, 1165 (1988), held that the provisions of the United States Constitution prevail over any international agreement or foreign sovereign laws, rights and/or privileges.

The defendant has failed to cite to any cognizable authority, international or otherwise, that stands for the proposition that the defendant is immune from being hauled into civil and/or criminal courts within the United States. The materials submitted by the defendant, among other things, claim to establish that "Nigritia" is a foreign sovereign and the defendant is a representative of said sovereign. It is unclear from the defendant's materials whether he is asserting diplomatic immunity and/or whether he claims that this Court does not have jurisdiction over any "Nigritian" citizen. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct.Rptr. 1962 (1983); *See also* Tabion v. Mufti, 73 F.3d 535 (4th Cir. 1996).

Diplomats who injure another person while driving under the influence may be required to leave the United States if they decline to waive diplomatic immunity. David A. Jones, Jr., Diplomatic Immunity: Recent developments in law and practice, 85 Am.Soc.Intl.L.Proc. 251, 264 (April 19, 1991).

THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA)
DOES NOT PROHIBIT JURISDICTION

> The Foreign Sovereign Immunities Act (FSIA) 28 USC §§1602-1611 (1988) sets forth the terms and conditions of a foreign sovereign being immune from civil and criminal liability. "According to scholarly commentators, absolute foreign sovereign imn restrictive theory of immunity was, in effect, codified by the passage of the FSIA."

In Re Doe: 860 F.2d 40 (2nd Cir. 1988) (citations omitted).

However, the defendant has failed to establish two critical elements: (1) That "Nigritia" is a recognized sovereign under federal law, and; (2) the defendant is a recognized official within that sovereign foreign country. The mere assertion is insufficient.

In a similar factual case the Tenth Circuit Court of Appeals held that unsupported assertions of diplomatic immunity will not terminate civil and/or criminal litigation. Punchard v. New Mexico, 956 F.2d 278 (10th Cir. 1992).

The court went on to hold "[W]e believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law." Id at 45. *See also* Republic of the Philippines v. Marcos, 806 F.2d 344, 360 (2nd Cir. 1986).

Conceding that the previous referenced authority deals with a specified and limited form of diplomatic immunity referred to as "head-of-state immunity," the State would argue that if the head-of-state fails to possess the immunity so does any immunity asserted by the instant defendant.

In Holloway v. Walker, 811 F.2d 263 (5th Cir. 1987) the Federal Circuit Court of Appeals rejected a defense of diplomatic immunity since no legal and/or factual showing of diplomatic immunity existed. In that case, the court rejected the defense's attempt to offer "diplomatic immunity" as a basis to use deadly force.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Immunity Grant

A G R E E M E N T

A. INTRODUCTION

This is an agreement between the Washoe County District Attorney's Office and made with Deputy District Attorney [deputy's name] with the full knowledge and consent of [defendant's name] attorney [defendant's attorney's name]. The agreement becomes effective upon being signed by [defendant's name], his/her attorney, [defendant's attorney's name], and Deputy District Attorney [deputy's name]. There is no agreement of promise of any kind between the District Attorney's Office and [defendant's name] that is not set forth in this document.

B. CONSTITUTIONAL RIGHTS

1. I, [defendant's name], understand that I have certain constitutional rights that are set forth below.

2. I, [defendant's name], have been advised by my attorney that I do not have to answer questions or make statements of any kind; I know that I have the right to remain silent and that by entering into this agreement voluntarily, I waive my privilege against self-incrimination.

3. I, [defendant's name], also know that I have the right to have my attorney with me during all conversations with law enforcement officers or members of the District Attorney's Office; I do not give up this right as part of this agreement, but I may give it up from time to time on the advice of my attorney.

4. I, [defendant's name], waive my right to trial by jury, at which trial the State would have to prove my guilt on all elements of each charge against me beyond a reasonable doubt.

5. I, [defendant's name], waive my right to confront my accusers, that is, the right to confront and cross examine all witnesses who would testify at trial.

6. I, [defendant's name], waive my right to subpoena witnesses for trial for me.

C. PENDING CHARGES

I, [defendant's name], understand that I am currently charged in an [charging document's name] filed in [where filed], case number [case number] with [charges] each a [level of crime(s)].

D. OBLIGATIONS

1. I, [defendant's name], understand that under this agreement I am undertaking certain obligations, and I willingly and voluntarily do so.

2. I, [defendant's name], have information regarding [what the defendant will provide].

3. I, [defendant's name], agree to provide a truthful statement, responding to questions, regarding my involvement and that of all others, specifically including #, in the # that is the subject of investigation by the [agency] in their case numbered [case number].

4. I, [defendant's name], accept the duty to cooperate fully and honestly, by providing truthful information, in any investigation by the [agency] or the Washoe County District Attorney's Office concerning the [crime] that is the subject of the investigation by the [agency] in their case numbered [case number].

5. I, [defendant's name], understand that besides telling [agency] Officers and/or Deputy District Attorney's or their investigators what I know and besides a participating in the possible investigations cited above, I may be required to testify truthfully before the Washoe County Grand Jury, or in Justice Courts and/or District Courts in the State of Nevada; I agree to give such testimony and understand that I will be required to meet all deadlines established by the District Attorney's Office.

6. I, [defendant's name], understand that, overriding all else, my most important obligation is to tell the truth and to tell only the truth; always, both during the investigation and when in a court or in front of a grand jury, I am required to tell only the truth, no matter whether the questions are asked by police officers, prosecutors, investigators from the District Attorney's Office, defense attorneys, grand jurors or judges.

7. I, [defendant's name], am aware of the provisions of NRS 174.061; I understand that this agreement is void if any testimony I give pursuant to this agreement is false; I understand that nothing in this agreement limits any testimony I give pursuant to this agreement to any predetermined formula; I understand that nothing in this agreement makes this agreement contingent on any testimony I give pursuant to this agreement contributing to a specified conclusion.

8. I [defendant's name], agree to submit to polygraph examination at the State's request and understand that this agreement is void if my responses on such test or tests are not fully truthful, as indicated by the results of the polygraph examination or examinations.

9. I, [defendant's name], understand that should I disobey any law of the United States or of the State of Nevada (except minor traffic offenses) this agreement shall be void.

E. BENEFITS

1. I, [defendant's name], expect certain benefits as a result of keeping my part of this agreement; those benefits have been explained to me by my attorney, [defendant's attorney's name]; I understand that in return for my assistance as set forth above, I am entitled only to those benefits set out below.

2. I, [defendant's name], am entitled, if I cooperate fully as outlined above, to be charged with and plead guilty to [deal]; I understand that this agreement in not binding upon the District Court judge who will impose whatever sentence that judge deems fair and appropriate within the maximum limit prescribed by NRS [applicable statute], taking due account of the gravity of the particular offense and of my character.

3. I, [defendant's name], understand that no immunity or promises of dismissal have been made to me and no offer or "deal" has been made regarding anything other than the pending criminal case against me in [court], case numbered [case number]; I understand that I am not entitled to any immunity or promises of dismissal or any charge of perjury, false swearing, contempt, or subornation of perjury arising from actions under this agreement.

F. CONCLUSION

All parties to this agreement acknowledge by their signatures they have read the agreement, understand its terms and that what is set forth above is the complete agreement between [defendant's name], and the Washoe County District Attorney's Office and no other promises, express or implied have been made by either party.

SIGNED this _____ day of _____, 1998.

_____
[defendant's name]

SIGNED this _____ day of _____, 1998.

_____
[defendant's attorney]
Attorney for Defendant

SIGNED this _____ day of _____, 1998.

_____
[deputy's name]
Deputy District Attorney

See also Ricketts v. Adamson, 107 S.Ct. 2680 (1987).

[4] The precise statutory language of NRS 174.061 requires that the written agreement "include a statement that the agreement is void if the defendant's testimony is false." As noted above, we are of the opinion that the Legislature mandated the inclusion of such invalidating language in plea agreements in order to deprive the testifying defendant of an undeserved bargain where the recipient of the bargain testifies falsely. We do not glean from the measure a legislative purpose to prejudice the defendant against whom the testimony is given. **We therefore conclude that neither the provision added by the State requiring "truthful testimony," nor the statutory provision declaring an agreement void when perverted by false testimony are to be included within the written agreement provided for a jury's inspection. In other words, our district courts have both the discretion and the obligation to excise such provisions unless admitted in response to attacks on the witness's credibility attributed to the plea agreement.**

[5] Despite our conclusion, we perceive no compelling reason to reverse Sessions' conviction on the present facts. The cautionary jury instruction given to the jury on the risks inherent in plea agreements negated any prejudicial effect the written plea agreement may have otherwise had on the minds of the jurors. Although the district court should have exercised its discretion to excise the "testify truthfully" and "void if false" language from the agreement prior to inspection by the jury, the error was harmless. See Shaw, 829 F.2d at 717-18 cautionary jury instruction rendered erroneously allowed prosecutorial vouching harmless).

890 P.2d 792, 111 Nev. 328, Sessions v. State, (Nev. 1995)
---------- Excerpt from page 890 P.2d 796.

Ineffective Assistance of Counsel

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The appellant's Opening Brief offers a plethora of new evidence that was not admitted at trial. Such an attempt to influence the court, and offer new testimony, is not appropriate in these pleadings. NRS 189.050 states that an appeal is to be judged on "the record". The new evidence is not part of the record, and therefore it should not be considered. It should be noted that much of the "evidence" that the appellant refers to is speculative at best, and possibly non-existent.

The appellant appears to state an argument for ineffective assistance of counsel in his OPENING BRIEF. This argument should not be considered as grounds for granting of the proposed Appeal. "To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgement of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so sever that they rendered the jury's verdict unreliable." *See* Strickland v. Washington, 446 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied*, 471 U.S. 1004 (1985)." Lozada v. State, 110 Nev. 349, 353 (1994). Appellant has demonstrated neither prong of the Strickland analysis, therefore this issue should not be considered.

CONCLUSION

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Information Amendment

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TO AMEND INFORMATION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and moves this Honorable Court for an Order granting the State's request to amend the Information.

POINTS AND AUTHORITIES

STATEMENT OF FACTS

STATEMENT OF THE CASE

ARGUMENT

Amendment of the Information in this case is proper as the amendment is made before verdict, no different offense is charged and substantial rights of the defendant are not prejudiced.

NRS 173.095 provides in pertinent part:

The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudice.

The particular acts and description of the particular acts alleged to have been committed by the accused enable him to properly defend against the charges, thus, amendment is proper. Support for the State's position is found in Green v. State, 94 Nev. 176, 576 P.2d 1123, (1978).

Dated this _____ day of _____,.

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Information Sufficiency

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION

OF FOR Case No.

A WRIT OF HABEAS CORPUS. Dept. No.

_____/

RESPONSE AND OPPOSITION TO

POINTS AND AUTHORITIES
IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and KARL S. HALL, Chief Deputy District Attorney, and files its Response in Opposition to the Petitioner's Points and Authorities in Support of Petition for Writ of Habeas Corpus. This response is based upon the attached Points and Authorities, all papers and pleadings on file herein and the argument of counsel to be presented at the time of argument.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____

Deputy District Attorney

ISSUES PRESENTED

1. IS THE LANGUAGE CONTAINED IN COUNT IV OF THE INDICTMENT SUFFICIENT TO PUT APPELLANTON NOTICE OF THE CHARGES WHICH HE HAS TO DEFEND?

2. DID THE STATE PRESENT SUFFICIENT EVIDENCE AT THE GRAND JURY PROCEEDING TO SHOW THAT A CRIME WAS COMMITTED AND THAT APPELLANT COMMITTED THE CRIME?

ARGUMENT

ISSUE 1

A charging document should provide "a statement of the acts constituting the offense in ordinary and concise language, and in a manner as to enable a person of common understanding to know what is intended. Simpson v. District Court, 88 Nev. 654, 659, 503 P.2d 1225, 1229 (1972), citation omitted. The State has, in this case, set forth in plain and concise language the acts which the defendant, Appellant, is alleged to have committed. We have alleged that Appellant knowing that Adam Meyer was accused of committing the crime of Sexual Assault, did harbor and/or conceal and/or aid in avoiding arrest, trial and/or conviction of punishment. The State is not required to include in the charging document specific acts outlining how Appellant aided, harbored or concealed.

The Nevada Supreme Court has long held that a charge is sufficient if the ordinary wording of the statute is used and sets forth in a concise statement, the acts constituting the offense included so as to inform the defendant of what is intended. See, Siriani v. Sheriff, 93 Nev. 559, 571 P.2d 111 (1997); State v. Mills, 52 Nev. 10, 279 P. 759 (1929); State v. McFarlin, 41 Nev. 486, 172 P. 371 (1918).

The authority cited by the defendant is unpersuasive and easily distinguished. Characteristic of the case law cited by the defense is that the charging document in those cases either alleged a theory of "aiding and abetting" pursuant to NRS 195.020 or the State, at trial, attempted to convict appellant upon an "aiding and abetting" theory without charging that theory. When a charge contains an allegation of "aiding and abetting" the State must allege the specific acts constituting the "aiding and abetting." The language of the charging document in this case, does not contain any language which would

allow the State to change theories at trial. In Larson v. State, 86 Nev. 451, 470 P.2d 417 (1970), the Nevada Supreme Court stated:

> It is true this court has previously recognized that an indictment or information may charge the offense in the language of the statute except where, as in the case of attempt, the statute defining the offense does not state the essential elements. Citing State v. Raymond, 34 Nev. 198, 117 P. 17 (1911).

In this case the essential elements are contained within the statute. Thus, more specific language is not required in the charging document.

The first case relied upon by the defense is Labastida v. State, 112 Nev. 1502, 931 P.2d 1334 (1996). In Labastida, the appellant, Ms. Labastida, claimed that the language contained in the Information prevented her from determining the exact nature of the charges against her because the information provided alternatives and disjunctives and contained no specific acts committed by herself or acts by Strauser which she aided and abetted. The Nevada Supreme Court held that this position was without merit even though Labastida was charged as an aider and abettor. Id., 112 Nev. at 1512, 931 P.2d 1340, 1341. Likewise, the defendants reliance on Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983) and Lane v. Torvinen, 97 Nev. 121, 624 P.2d 1385 (1981), is misplaced. In Barren, the defendant was charged as a principal when in fact, the State proceeded on a vicarious liability theory, arguing that the appellant was guilty of murder and robbery on the basis of acts committed by the codefendant to further a mutual plan to burgle the victim's residence. Barren v. State, 669 P.2d at 727, 728.

In Lane v. Torvinen, supra, the Supreme Court upheld the dismissal of Counts I and III of the charging document because it contained no facts whatsoever showing how Lane aided and abetted the other defendants. Again, this was a case where the State proceeded under a vicarious liability theory at trial, i.e., conspiracy or aiding and abetting, yet failed to allege such a theory. 97 Nev. at 123, 624 P.2d at 1386.

In Simpson v. Eighth Judicial District, 88 Nev. 654, 503 P.2d 1225 (1993), the charging document was held insufficient as it would allow the prosecutor to change theories at will. That simply is not the situation in the case at hand. The defense cites Sheriff v. Standal, 95 Nev. 914, 604 P.2d 111 (1979), as authority for its position. Again, in that case the State proceeded on an aiding and abetting

theory where the Indictment did not contain the required aiding and abetting language. Finally, the defense cites Smith v. State, 572 P.2d 262 (Okl. Cr. App. 1977). This case is cited in dicta in Sheriff v. Standal, supra. This case is from another jurisdiction and is not precedent in the State of Nevada, and is unpersuasive.

The State has put the defendant on notice with sufficient language to allow him to prepare and defend the alleged crime. Therefore, the defense motion for dismissal of the Indictment should be denied.

ISSUE 2

The State presented sufficient evidence before the Grand Jury to bind the defendant over for trial in the Second Judicial District Court. In order for a Grand Jury to properly bind over defendant for trial, there must be "probable cause" to believe

(1) that a crime has been committed, and (2) that the defendant committed the crime. NRS 172.155(1). Probable cause to bind the defendant over for trial may be based on "slight," even "marginal" evidence because it does not involve a determination of guilt or innocence of an accused. Sheriff v. Middleton, 112 Nev. 956, 921 P.2d 282 (1996). In Graves v. Sheriff, 88 Nev. 436, 438, 498 P.2d 1324, 1326 (1972), the Nevada Supreme Court stated:

> Probable cause requires the evidence to be weighed toward guilt, even though there may be room for doubt. The facts must be such as would lead a person of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____

Deputy District Attorney

Intent Specific Use of Other Act Evidence

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Evidence of Prior Bad Acts Is Admissible To Establish And Prove Intent, And Absence Of Accident Or Mistake.

NRS 48.015 provides that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" NRS 48.025 excludes the admission of evidence that is not relevant.

NRS 48.035 provides as follows:

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

3. Evidence of another act or crime which is so closely related to an act in controversy or a crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

NRS 48.045(2) provides as follows:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [Emphasis added].

By entering a plea of not guilty to the crimes alleged in the Information, TIETJEN placed her intent at issue in this case. McMichael v. State, 94 Nev. 184, 188 (1978). It is well settled that other acts

evidence may be used to prove intent. See Hill v. State, 95 Nev. 327 (1979); Colley v. State, 98 Nev. 14 (1982); McMichael, supra, 94 Nev. 184; Findley v. State, 94 Nev. 212 (1978).

[N]o reference shall be made to such collateral offenses unless, during the state's case-in-chief, such evidence is relevant to prove motive, intent, identity, the absence of mistake or accident, or a common scheme or plan; and then, only if such evidence is established by plain, clear, and convincing evidence. Petrocelli, supra, 101 Nev. 46 (citing Carlson v. State, 84 Nev. 534, 537 (1968)).

In Margetts v. State, 107 Nev. 616 (1991), Margetts was a coin dealer who bought 100 gold "krugerrands" on credit from another dealer at a coin show. Margetts was supposed to pay the other dealer for the coins at the end of the week long show. During the week, Margetts sold the coins and lost all the proceeds in casino gambling. Margetts gave the other dealer a bad check; hence, failing to repay the debt.

Margetts was charged with obtaining money under false pretenses and swindling. At trial, Margetts testified that he had no intention of swindling the other dealer, and that he tendered the bad check by mistake.

The Supreme Court upheld the decision of the District Court wherein the State was permitted to present prior bad act evidence that Margetts had swindled the other dealer in the past to establish intent and absence of mistake. The Supreme Court held that Margetts placed his intent at issue, making prior bad act evidence admissible to prove intent, or absence of mistake. See also Brinkley v. State, 101 Nev. 676 (1985).[11]

---

[11] In Brinkley, 101 Nev. 676, the Supreme Court upheld the admission of prior bad act evidence wherein Brinkley was convicted of unlawfully obtaining a controlled substance or prescription, and of conspiracy to obtain a controlled substance or prescription. At trial, Brinkley claimed that the failure to disclose to each practitioner that he was receiving controlled substances from other practitioners was the result of an innocent mistake. The Supreme Court upheld the admission of prior bad act evidence showing that Drummond, subsequent to the occurrence of the substantive crimes, attempted to obtain a controlled substance by utilizing a forged prescription, while Brinkley waited outside in the car. The Supreme Court held that "[t]he forged prescriptions also tended to prove that Brinkley and Drummond planned and

In Margetts, 107 Nev. 616, Margetts had previously swindled the same dealer who he then swindled some time later. In this case, TIETJEN previously passed a forged/altered check to the Plantation, and has now passed checks at the Rail City Casino without having sufficient funds in her account. Thus, the facts in Margetts, 107 Nev. 616, and this case are starkly similar.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

---

schemed to obtain numerous prescriptions for controlled substances; and the evidence logically tended to show a common plan or scheme.

Inevitable Discovery

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Trooper Stop Was Lawful and Justified.

NRS 171.123 provides in pertinent part as follows:

> Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

In Gama v. State, 112 Nev. 833 (1996), the Nevada Supreme Court abolished the concept of pretextual traffic stops, and adopted the "could have" test. As long as an officer makes a lawful traffic stop that is neither unreasonably intrusive, nor unreasonably lengthy, he or she may effectuate a traffic stop for any other reason or purpose, i.e., searching for narcotics.

Trooper made a lawful and justified stop.

C. A Warrant Was Not Necessary to Search The Vehicle Since Brooke and Williams Voluntarily Consented To The Search.

The United States Supreme Court has held that a search of a vehicle only requires probable cause to believe that evidence of a crime is present in a vehicle. See California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985). However, the Nevada Supreme Court adheres to the more stringent requirement that exigent circumstances must be present to justify a warrantless vehicle search. See Barrios-Lomeli, 944 P.2d 791 (1997) (citing State v. Harnisch, 113 Nev. 214, 222 (1997)).

Mere police questioning does not constitute a seizure. State v. Burkholder, 112 Nev. 535, 915 P.2d 886, 888 (1996)(citation omitted). The police may randomly -- without probable cause or a reasonable suspicion -- approach people in public places and ask for leave to search. Id.

For consent to be lawfully obtained, the State must demonstrate that it was voluntarily given. Voluntariness is a question of fact to be determined from the totality of the circumstances. United States v. Cannon, 29 F.3d 472, 477 (9th Cir. 1994) (citing Illinois v. Rodriguez, 497 U.S. 177, 183-89, 110 S.Ct. 2793, 2798-2802 (1990)). An important factor to consider when determination if consent is voluntarily given is whether an officer's actions are coercive. Id. (in Cannon, 29 F.3d 472, supra, the U.S. Supreme Court determined that consent was voluntary by considering factors such as no guns were drawn on the suspect, no force was used against the suspect, and handcuffs were not placed on the suspect).

To establish a lawful search based on consent, the State must demonstrate that consent was voluntary and not the result of duress or coercion. Burkholder, supra, 112 Nev. 535, 915 P.2d at 888 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 248, 93 S.Ct. 2041, 2058 (1973)). Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request or otherwise terminate the encounter. Id. (citation omitted). "'The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.'" Id. (citing Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988)).

"'[W]hile the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.'" Id. (citing Schneckloth, supra, 412 U.S. at 248-49, 93 S.Ct. at 2059).

In Burkholder, 112 Nev. 535, supra, the Nevada Supreme Court found that consent was voluntarily obtained by considering factors such as the officer did not touch the suspect, did not display his weapon, did not use a commanding tone in his questions, and did not threaten the suspect. The officer merely approached the suspect on the street, identified himself as a police officer, had a brief conversation with the suspect, and asked the suspect for consent to search.

See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977; Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882 (1997).

The Traffic Stop Was Not Unreasonably Intrusive, Nor

Unreasonably Lengthy.

NRS 171.123(4) provides as follows:

> A person must not be detained longer than is reasonably necessary to effect the purpose of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

Officers are permitted to detain persons suspected of criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). There are two prongs which must be considered when determining whether a proper Terry stop has occurred. First, courts must ask whether the officers' action was justified at its inception. See United States v. Toledo, 139 F.3d 913 (10th Cir. 1998) (citing Terry, supra, 392 U.S. at 20). Second, courts must ask whether the officers' actions during the detention were reasonably related in scope to the circumstances that justified the interference in the first place. Id.

An officer may expand a stop beyond its initial scope, however, if the suspect consents to further questioning, or if the detaining officer has "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" Id. (citing United States v. Lambert, 46 F.3d 1064, 1069 (10th Cir. 1995)).

An officer is permitted to make a lawful traffic stop, and investigate reasonably suspected criminal activity, if the stop is neither unreasonably intrusive, nor unreasonably lengthy. See Gama, supra, 112 Nev. 833.

Even If The Search Of The Milk Shake Container Was Beyond the Scope Of Consent to Search The Vehicle, The Milk Shake Container Would Have Been Inevitably Discovered.

Evidence obtained, even though not pursuant to a warrant or exigent circumstance, will not be suppressed if the evidence would have been inevitably discovered. See Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984). Inevitable discovery can be proved upon a showing that the evidence would have been found in an inventory search that would inevitably follow seizure of a car. United States v.

Kennedy, 61 F.3d 494, 498 (6th Cir. 1995); see also Clough v. State, 92 Nev. 603 (1976); Carlisle v. State, 98 Nev. 128 (1982).

CONCLUSION

For the aforementioned reasons, Defendants' Motion to Suppress should be denied in its entirety.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Inevitable Discovery of Evidence on the Person

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO

SUPPRESS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and opposes defendant Singleton's Motion to Suppress filed August 24, 1999, and Supplemental Motion to Suppress filed August 30, 1999. This Opposition is supported by the attached Points and Authorities, all papers on file in this case, and anticipated testimony at a suppression hearing currently set for September 3, 1999.

DATED this ___ day of , .

RICHARD A GAMMICK
District Attorney
Washoe County, Nevada

By

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

Typically, evidence discovered as the result of a constitutional violation will be excluded to deter police misconduct. Wang Sun v. United States, 371 U.S. 471 (1963). However, when evidence "would inevitably have been discovered without reference to the police error or misconduct," the police shall not be placed in a worse position by virtue of their error. Nix v. Williams, 467 U.S. 431, 448 (1983). The evidence is admissible "[i]f the prosecution can prove by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means..." Id., at p. 444. In Nix, the defendant led officials to the murder victim's body due to comments made by a deputy after the defendant had invoked his right to an attorney. Physical evidence from the victim was admissible since there was a massive search effort and search teams were near the area where the body was found, strongly inferring that her discovery was inevitable. Id. "[T]he inevitable discovery exception to the exclusionary rule applies when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or other compelling facts establishing that the disputed evidence inevitably would have been discovered." United States v. Kennedy, 61 F.3d 494, 498-500 (6th Cir. 1995).

A search incident to arrest is a well delineated exception to the warrant requirement. "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." United States v. Robinson, 414 U.S. 218, 234 (1973). "A custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification." Illinois v. Lafayette, 462 U.S. 640, 644-45 (1983).

Such searches have been upheld as a valid exception to the search warrant requirement. "[I]t is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." Illinois v. Lafayette, supra, at p. 648. See also, Abel v. United States, 362 U.S. 217, 239 (1960); United States v. Edwards, 415 U.S. 800, 807 (1974).

Respectfully submitted this ___ day of , .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Intoxicated Suspect Miranda Voluntariness

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Once a suspect has been apprised of his Miranda rights, he must affirmatively waive them prior to being interrogated. Stringer v. State, 108 Nev. 413, 417 (1992). The State need only prove that he waived his Fifth Amendment rights against self-incrimination by a preponderance of the evidence. Colorado v. I Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 522 (1986); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972); Scott v. State, 92 Nev. 552, 554 (1976)

The validity of the waiver must be determined in each case through an examination of the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981); Rowbottom v. State, 105 Nev. 472(1989)

In citing Falcon v. State, 110 Nev. 530 (1994), Matter goes far beyond the holding of the Court to support his position. In that case, Falcon’s conviction was

affirmed and the Court held that defendant's waiver of his Fifth Amendment rights was knowingly and intelligently made. Falcon claimed that due to his ingestion of drugs prior to arrest the waiver could not have been knowingly and intelligently given.

After pointing out that the validity of a waiver must be decided on a case-by-case basis and the State must prove it by a preponderance of the evidence, the Court cited Stewart v. State, 92 Nev. 168, 170-171 (1976), for the proposition that,

"Mere intoxication will not preclude the admission of defendant's statements unless it is shown that the intoxication was so severe as to prevent the defendant from understanding his statements or his rights."

The Nevada Supreme Court in Falcon v. State, su~ra, cited to an Arizona Supreme Court case in which the admission of defendant's statements were upheld even though he had a 0.24 percent blood alcohol level. See State v. Clark, 517 P.2d 1238, 1240 (1974)

In Anderson v. State, 109 Nev. 1129 (1993), the defendant claimed his waiver was not knowingly and intelligently made due to the fact that his blood alcohol level was 0.088 percent, he was only twenty-six years old, had no experience with the criminal justice system, and at the time was being treated in the hospital for head injuries sustained in a serious traffic accident which resulted in three deaths. The Supreme Court disagreed noting in part that the defendant was responsive to the questions asked and aware of the importance of his statements. Therein, the Court cited the case of State v. Rivera, 733 P.2d 1090, 1096 (Ariz. 1987), in which the defendant was clearly intoxicated yet found to have intelligently and knowingly waived his Miranda rights.

Thus, it is clear that although Notter wants this Court ~o believe that intoxication precludes a knowledgeable and intelligent waiver of a constitutional right, this is simply not :he law. In fact if it was, no DUI suspect or user of a
controlled substance or even a prescription drug could ever be properly interviewed or consent to a search.

A confession obtained while under the influence of narcotics is governed by much the same rule as a confession made under the influence of intoxicating

liquors. The effect of narcotics relate generally to the credibility to be given the confession, rather than its admissibility. 23 C.J.S. Crim. Law. §828, p. 228.

The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Miranda warnings insure that a waiver of these rights is knowing and intelligent by fully advising the suspect of this constitutional privilege, including the critical advice that whatever he chooses to say may be used against him and that he has the right to remain silent and have counsel present.

Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he knew he could stand mute and have the assistance of counsel, and that he was aware of ~he State's intention to use his statements against him, the analysis is complete and the waiver is valid as a matter of law. "Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135 (1986)

In Colorado v. Connelly, supra, the United States Supreme Court overturned a Colorado Supreme Court's decision upholding the trial court's suppression of defendant's statements as not being a product of a "rational intellect and free will." The State courts had

ruled that Connelly's impaired mental ability (psychological) precluded his ability to make a valid waiver of his Miranda rights.

Unlike the instant matter, this case revolves solely around the issue of the voluntariness of the defendant's statements, and the Court in finding them to be voluntary made the following statement, "Only if we were to establish a brand new constitutional right - - the right of a criminal defendant to confess to his crime only when totally rational and properly motivated -- could respondent's present claim be sustained." 479 U.S. 1GG, 107 S.Ct. 521.

> Proof that the accused was intoxicated at the time he made the statement will not, without more, prevent the admission of his statement. Before such a statement will be held to be inadmissible, it must be shown that the accused was intoxicated to such an extent that he was unable to understand the meaning of his comments. Of course, the jury may consider intoxication in determining whether the statements are true or false. (Citations omitted) . State v. Hicks, 649 P.2d 267, 275 (Ariz. 1982) (Upholding admissibility of

defendant's statements in spite of a 0.26 percent blood alcohol level, some difficulty answering questions and inability to remember his address).

In State v. Clark, 434 P.2d 636, 639 (Ariz. 1967), the Court upheld the admission of defendant's statements made while he was intoxicated and had a 0.38 percent blood alcohol level, stating, "certainly any man who can manufacture the excuse that bloodstains on a shirt came from his wife's mouth after having her teeth pulled has the control over his mental faculties to understand what he is saying."

In U.S. v. Short, 947 F.2d 1445 (10th Cir. 1991), the defendant was interviewed following an apparent waiver of his Miranda rights. He had been in a serious motorcycle accident nine days before and hospitalized for five days. He was still in numerous casts for broken bones and had one hundred facial stitches. He was on doctor-prescribed Percodan and Hydracodeine f or the pain. Defendant claimed he was in a great deal of pain, drowsy, relaxed and would often forget where he was. The officers acknowledged he looked like he was in pain, "but he never stated he was in an over abundance of pain whatsoever."

Inventory Search Auto

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, Washoe County District Attorney, and , Deputy District Attorney, and hereby files its Opposition to Defendant's Motion to Suppress; and Memorandum of Points and Authorities in support thereof. This Response is made and based upon the following Points and Authorities, the exhibit(s) attached thereto and all pleadings and papers on file herein.

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

II. ARGUMENT

The Evidence Located By Officers Must Not Be Suppressed Since It Was Obtained Due To A Lawful Inventory Search.

It is well-established that police officers need not comply with the Fourth Amendment's probable cause and warrant requirements when they are conducting an inventory search of an automobile in

order to further some legitimate caretaking function.[12] Weintraub v. State, 110 Nev. 287, 871 P.2d 339, 340 (Nev. 1994) (citing South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976)). The inventory search must be carried out pursuant to standardized official department procedures and must be administered in good faith in order to pass constitutional muster. Id. (citing Colorado v. Bertine, 479 U.S. 367, 374, 107 S.Ct. 738, 742 (1987)).

The Supreme Court has held that a police officer must produce an actual inventory when she or he conducts an inventory search. Id. (citing State v. Greenwald, 109 Nev. 808, 858 P.2d 36 (Nev. 1993)); see also Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635 (1990).

In Wells, supra, 495 U.S., at 4, 110 S.Ct. 1635, the United States Supreme Court stated as follows:

> . . . an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory [citations omitted]. A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors.

In Greenwald, supra, the Supreme Court held that the inventory search of a motorcycle conducted by an officer was unlawful since it was too exacting of a search, including examining the contents of the gas and oil tanks, dismantling a flashlight, searching all the pockets of all the clothing found on the motorcycle and a complete internal inspection of the buckled saddlebags affixed to the motorcycle.

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[12] The inventory search exception to the warrant requirement is premised on an individual's diminished expectation of privacy in an automobile and three important governmental interests in inventorying an automobile: to protect an owner's property while the automobile is in police custody, to ensure against claims of lost, stolen, or damaged property, and to guard the police from danger. United States v. Lomeli, 76 F.3d 146, 148 (7th Cir. 1996) . . . But the fact that an inventory search may also have had an investigatory motive does not invalidate it. Id.

Furthermore, the officer's inventory list failed to include many of the items located during the search; hence, the Supreme Court held that the inventory search was actually an unlawful search for evidence.

In Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court held that the inventory search of the defendant's backpack after he was arrested was unlawful. The officers in this case testified that they were looking for contraband when they searched the backpack. Furthermore, the record did not indicate that a formal inventory was prepared at the time of arrest.

Clearly, the inventory search of the Mazda in this case is distinct from the inventory searches in Greenwald, supra, and Rice, supra. The testimony of Officers Gibson and Adamson indicates that the inventory search was conducted according to UNRPD policy and procedure, and their intention was to protect

the property of the owner of the vehicle, and make a record so that UNRPD would not be liable for any missing or stolen items.

C. Even If The Court Finds That The Inventory Search Was Not According to UNRPD Policy And Procedure, The Evidence Would Have Been Inevitably Discovered Due To The Necessity Of Conducting An Inventory Of The Mazda; Hence, The Evidence Must Not Be Suppressed.

The inevitable discovery exception applies when, at the time of the unlawful search, there was a separate independent line of investigation underway, or there are compelling facts indicating, that the disputed evidence would have inevitably been discovered, such as proof that the evidence would have been found in an inventory search that would inevitably follow seizure of a car. United States v. Kennedy, 61 F.3d 494, 498 (6th Cir. 1995). See also Clough v. State, 92 Nev. 603, 604-05, 555 P.2d 840, 841 (Nev. 1976); Carlisle v. State, 98 Nev. 128, 129-30, 642 P.2d 596, 597-98 (Nev. 1982).

The reason the Supreme Court in Greenwald, supra, and Rice, supra, found inventory searches to be improper is because facts were present indicating that officers were actually using the inventory search as a ruse for searching for evidence and contraband. Clearly, the Supreme Court disapproves of officers rummaging through a suspect's belongings through the guise of an inventory search.

D. The Evidence Located By Officers Must Not Be Suppressed Since It Was Obtained Due To A Lawful Search Incident To Arrest.

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification. New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864 (1981) (citing United States v. Robinson 414 U.S. 218, 235, 94 S.Ct. 467, 476 (1973)).

In Belton, supra, 453 U.S. 454, 101 S.Ct. 2860 (citing and quoting Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969)), the United States Supreme Court stated:

> "Articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'"

> The United States Supreme Court held that:
> When a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to arrest, search the passenger compartment of that automobile. Id. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so close will containers in it be within his reach. Id.

The Nevada Supreme Court has held, in order to search an automobile based on the "automobile exception" to the warrant requirement, a police officer must have probable cause to believe that criminal evidence is located inside an automobile, and must demonstrate exigent circumstances sufficient to dispense with the need for a warrant. State v. Harnisch, 113 Nev. 214, 931 P.2d 1359 (Nev. 1997); reh'g granted State v. Harnisch, 114 Nev. 225, 954 P.2d 1180 (Nev. 1998). See also Barrios-Lomeli, 113 Nev. 952, 944 P.2d 791 (Nev. 1997).

In State v. Greenwald, 109 Nev. 808, 810, 858 P.2d 36, 37 (Nev. 1993), the Nevada Supreme Court stated "the authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed." Hence, the Supreme Court did not consider the prosecution's argument that a valid search incident to arrest occurred since the defendant "was locked away

in a police car, and there was no conceivable 'need' to disarm him or prevent him from concealing or destroying evidence."[13]

The facts in the case at hand are starkly distinct from the facts in Greenwald, supra. In Greenwald, supra, the Supreme Court decided that the search of the motorcycle was not justified since the defendant was locked up in the police vehicle, and the search was made some time after the defendant's arrest. However, it is clear that the Supreme Court based its decision on its disapproval of the officer's blatant search of the motorcycle without a reasonable justification. Significantly, a motorcycle does not contain a passenger compartment similar to an automobile. In fact, the search in Greenwald, supra, is more analogous to the search of a bag or backpack found on or near a suspect's person incident to arrest. See Rice v. State, 113 Nev. 425, 936 P.2d 319 (Nev. 1997).

In Rice, supra, 113 Nev. 425, 936 P.2d 319 (Nev. 1997), the Supreme Court found that a search incident to arrest of the defendant's backpack was improper. In Rice, supra, the defendant was arrested and his backpack was left outside of the police vehicle.

Greenwald, supra, and Rice, supra, did not deal with the search of an automobile incident to lawful arrest. Clearly, Belton, supra, 453 U.S. 454, 101 S.Ct. 2860, held that officers may search the inside of an automobile, and containers located therein, due to a lawful arrest. Hence, the precedent set forth by the United States Supreme Court in Belton, supra, applies to this case.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

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[13] In Greenwald, supra, the defendant was stopped riding a motorcycle. After the officer locked the defendant inside a patrol vehicle, the officer proceeded to search every component of the motorcycle, including the saddlebag, gas and oil tanks and a flashlight. The Supreme Court also rejected the prosecution's argument that a valid inventory search was conducted.

By_____

Deputy District Attorney

Jackson v. Denno Hearing Juror's Responsibility

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT MORRIS' REQUEST FOR SPECIAL FINDING OF VOLUNTARINESS OF HIS CONFESSION ON THE GUILTY VERDICT AND REQUEST FOR HEARING

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and offers its Points and Authorities in opposition to Mr. Morris' request for a special interrogatory on the guilty verdicts for the jury to specifically answer whether they found the defendant's confession voluntary and considered it in their deliberations. Furthermore, the State respectfully requests a hearing on this issue prior to the court's ruling.

DATED this ___ day of , .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

In Jackson v. Denno, the U.S. Supreme Court held that "[a] defendant objecting to the admission of a confession is entitled to a fair hearing" to determine whether his statement is voluntary before allowing a jury to consider it during their deliberations. 378 U.S. 397, 380 (1964). Eight years later, the U.S. Supreme Court declined a defendant's request to require courts to submit the question of voluntariness of a confession to a jury in addition to the court's preliminary finding of voluntariness. "To the extent the position assumes that a jury is better suited than a judge to determine voluntariness, it questions the basic assumptions of Jackson v. Denno; it also ignores that Jackson neither raised any question about the constitutional validity of the so-called orthodox rule for judging the admissibility of confessions nor even suggested that the Constitution requires submission of voluntariness claims to a jury as well as a judge." Lego v. Twomey, 404 U.S. 487, 489-90 (1972).

Nevada chose to follow a more protective approach and require the jury to confirm the court's finding of voluntariness when challenged by the defendant. Carlson v. State, 84 Nev. 534, 536 (1968); 445 P.2d 157. However, neither Carlson nor any court has ever required the jury to state its finding as to voluntariness in its verdict. Special findings in criminal cases are not used to answer evidentiary questions or to confirm that jurors followed the instructions given to them; instead, special interrogatories state findings of fact that control the range of punishment, i.e., first or second degree murder, aggravating and mitigating circumstances found supporting the punishment arrived at during the penalty phase, and enhancements involving deadly weapons, crimes against the elderly, etc.

Expanding special interrogatories to include declarations by the jury of consideration given to particular items of evidence to confirm that the jury followed the instructions given runs counter to two long-standing and well-established policies. First, jurors are presumed to follow the instructions of law given to them by the courts. See, Bruton v. United States, 391 U.S. 123, 135 (1968); Richardson v. Marsh, 481 U.S. 200, 206-07 (1987). Additionally, requiring the jury to state their findings on specific items of evidence violates the age-old rule against violating the privacy and secrecy of deliberations by requiring the jury to impeach their own verdicts. See, Tanner v. United States, 483 U.S. 107, 119-127 (1987); United States v. Olano, 507 U.S. 725, 738 (1993); Pinana v. State, 76 Nev. 274, 288 (1960); 352 P.2d 824.

> "Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court..."Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 [based on the long line of common law applicable to Nevada] should not permit any inquiry into the internal deliberations of the jurors."

Tanner, supra, at pp. 124-25.

This line of case law allows verdicts to stand where there may have been juror misconduct during deliberations that was not the result of external influences. Mr. Morris cannot legitimately complain of a constitutional violation based upon the court's refusal to grant him the requested special interrogatory. "A defendant is entitled to a fair trial but not a perfect one." Bruton, supra, at p. 135 [citations omitted].

Allowing Mr. Morris to present a special interrogatory to the jury will not assure that his constitutional rights are protected, but instead will work to undermine the sanctity and finality of a jury's verdict by creating more unnecessary appellate issues. As the Nevada Supreme Court quoted:

> In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution. United States v. Young, supra, 105 S.Ct. at 1047.

Miranda v. State, 101 Nev. 562, 571 (1985); 707 P.2d 1121. Mr. Morris' request for a special interrogatory does nothing more than to isolate one piece of evidence, his confession, and place undue emphasis upon it in comparison to all other pieces of evidence pointing to him as one of Branson Clark's murderers, which would only serve to unnecessarily confuse the jurors and attempt to create issues on appeal. Furthermore, granting Mr. Morris his special interrogatory would open a flood gate of issues without the sanctioning or guidance of our appellate courts; for instance, what if the jury found the confession involuntary when the court has found it otherwise, but the jury heard the evidence nonetheless? And shouldn't the jury then be asked whether or not they found the defendant guilty beyond a reasonable doubt independent of the confession? Should they be asked that question even if they found the confession voluntary to preserve the issue for appellate review?

Respectfully submitted this ___ day of July, .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By

Deputy District Attorney

James Hearing

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Defendant, Phyllis Jean Miller, is charged by way of Criminal Information with conspiring with Bryan Brake to commit Murder, Murder, and Aiding and Abetting Bryan Brake in the crime of Murder.

Plaintiff proceeds upon Counts I and II upon the theory of conspirator liability which has long been recognized in Nevada and most every other state. ~ State v. Beck, 42 Nev. 209 (1918); Pinkerton v. U. S., 328 U. S. 640 (1946). Although defendant is not alleged to have shot Michael Miller, if the killing was done in furtherance of a conspiracy, she is equally responsible for the murder as the coconspirator, even if she was not present during the killing. This vicarious liability for the substantive offense is still widely accepted. For more current Nevada cases, see State v. Wilcox, 105 Nev. 434 (1989); Sheriff v. Lang, 104 Nev. 539 (1988); Lane v. Torvinen, 97 Nev. 121, 123 (Footnote 3) (1981); McKinney v. Sheriff, 93 Nev. 70 (1977)

Completely separate, yet still consistent with conspirator liability, plaintiff has charged defendant with aiding and abetting the commission of this brutal killing (Count III). This charge comes under the purview of NRS 195.020 and is not dependant upon proof of a conspiracy.

Once Bryan Brake takes the stand, defendant's instant motion to exclude his previous statements as not being included under 51.035(3) (e), becomes moot. Bryan Brake has given Court testimony in his own trial and at Phyllis Miller's preliminary hearing. These are clearly admissible pursuant to NRS 51.035 (2) (d) .Even if he should unexpectedly refuse to testify, the statements are admissible as former testimony when the declarant is unavailable as a witness. See NRS 51.325. "Unavailable" includes refusing to testify. ~ MRS 51.055.

All of his other statements will undoubtedly be admissible as either inconsistent or consistent statements. ~ NRS 51.035 (2) (a) (b). Most likely, both plaintiff and defendant in this matter will also attack his improper influence or motive or fabrication in making any statements. ~ MRS 51.035 (2) (b).

Inconceivably and only as a last resort, will plaintiff ever have to rely on NRS 51.035 (3) (e) to admit his statements as coconspirator statements made in furtherance of the conspiracy.

If that circumstance should occur, the State must present only prima facie evidence of a conspiracy before admission of Brake's statements made in furtherance of the conspiracy. McDowell v. State, 103 Nev. 527 (1987) (slight evidence); Carr v. State, 96 Nev. 238 (1980); Peterson v. Sheriff, 95 Nev. 522 (1979). This proof can be met entirely by circumstantial evidence and the inference derived therefrom.
Sheriff v. Lang, supra; Goldsmith v. Sheriff, 85 Nev. 295 (1969) "This rule is sanctioned for the obvious reason that experience has demonstrated that as a general proposition a conspiracy can only be established by circumstantial evidence." Ibid.

As stated in McDowell v. State, supra, Nevada does not follow the "substantial independent evidence" or "preponderance" test from the federal courts, and instead relies upon "slight evidence" of the existence of a conspiracy prior to admission of hearsay statements made by a coconspirator. Defendant is clearly in error to suggest otherwise. Plaintiff can easily meet this proof. However, such a hearing is unnecessary until and unless defendant can indicate which statements of Bryan Brake would be inadmissible as hearsay. As stated above, it is inconceivable that defendant can meet this burden whether Bryan Brake voluntarily testifies or not.

Therefore, defendant's entire premise in requesting the so-called James hearing is in error. Plaintiff is not attempting to introduce hearsay statements of a coconspirator. Whether

he testifies or not, the statements are exempt from or specific exceptions to the hearsay rule on other grounds than 51.035 (3) (e)

CONCLUSION

Based upon the foregoing, it is hereby respectfully requested that defendant's Motion In Limine regarding coconspirator's statements b,e denied.

Joinder Co-defendants

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR SEVERANCE AND SUPPRESSION OF STATEMENTS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS.

III. ARGUMENT

Joinder of these two defendants is appropriate in the instant case pursuant to Nevada case law and statutes as the defendants have failed to show prejudice.

> NRS 174.155 provides:
> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Relief from joinder is appropriate where a defendant or the State of Nevada is prejudiced by joinder of offenses or of defendants.

> In ruling on a motion by a defendant for severance the court may order the district attorney to deliver to the court for inspection in chambers any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial. See NRS 174.165.

ANTAGONISTIC DEFENSES.

The defense is claiming that the fact that both defendants claim that the other one shot Branson Clark presents an "antagonistic defence". The United States Supreme Court has recently held that the mere presence of a mutually antagonistic defense is not prejudicial per se. Jones v. State, 111 Nev. 848, 899 P.2d 544 (citation ommitted). The general rule in Nevada controlling the issue of severance is also found in Jones v. State, where the Court stated: Under the Haldeman standard, a defendant moving for severance must show that: "the defendants [have] conflicting and irreconcilable defenses and there is danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." United States v. Haldeman, 559 F.2d 31, 71 (D.C.Cir.1976).

As stated above the United States Supreme Court has recently held that the mere presence of a mutually antagonistic defense is not prejudicial per se. Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed. 317 (1993). In Zafiro, the defendants moved for severance after claiming that their defenses were mutually antagonistic. Justice O'Connor of the United States Supreme Court delivered the opinion of the court and held that denial of the motion to sever was proper. The facts of the Zafrio case are as follows: Defendants Zafrio, Martinez, Garcia, and Soto were accused of distributing drugs in the Chicago area, primarily out of Soto's bungalow and Zafiro's apartment. One day, Government agents followed Garcia and Soto and saw them place a large box in Sotos car and drive from Soto's bungalow to Zafiro's apartment. As the two carried the box upstairs they were approached by the agents. Garcia and Soto dropped the box and ran into the apartment. The agents followed them into the apartment and found the four defendants inside the apartment. The dropped box contained 55 pounds of cocaine. A search of the apartment revealed and additional 16 pounds of cocaine, 25 grams of heroin, and 4 pounds of marijuana in a suitcase in a closet. $22,960 was found in a sack next to the suitcase and 7 pounds of cocaine were found in a car parked in Soto's garage.

Garcia and Soto moved for severance. Soto testified that he know nothing about the drug conspiracy or about the contents of the box. Garcia's lawyer argued that Garcia was innocent; that the box belonged to Soto and Garcia was ignorant of it's contents.

Zafiro and Martinez also repeatedly moved for severance on the ground that their defenses were mutually antagonistic. Zafiro testified that she was merely Martinez's girlfriend and knew nothing about a conspiracy. She stated that she allowed Martinez to stay in her apartment on occasion, but had no idea that the suitcase he stored in her apartment contained drugs. Martinez did not testify, but claimed that he was merely visiting his girlfriend and had no idea that she was involved in distributing drugs.

All four defendants were convicted with various charges including conspiracy to distribute cocaine, heroin, and marijuana.

The court initially noted that severance would be proper where "defendants present mutually antagonistic defenses" in the sense that "the acceptance of one party's defense precludes the

acquittal of the other defendant." Id. at 113 S.Ct. 937. (citations omitted). However, the Zafiro Court refused to adopt a "bright line rule" in that regard stating: "Mutually antagonistic defenses are not prejudicial per se. Moreover, rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Zafiro, 113 S.Ct. at 938.

In the instant case the fact that Moore claims that Morris is the shooter and vise versa is of no consequence as both are equally liable under the law of the felony murder rule and conspiracy. Both are principals to the crime under the law whether or not they fired the fatal shot. Therefore, the acceptance of one parties' claim that he was not the shooter does not preclude acceptance of the other parties defense as it is possible that Tim Henderson or Donnell Duckworth fatally wounded Branson Clark.

The Nevada Supreme Court, following the rational of Zafiro in Jones v. State, 111 Nv. 848, 899 P.2d 544 (1995), denied the appellants motion for severance based upon a claim of antagonistic defenses. The Jones case involved 4 defendants who had broken into an apartment and while inside had robbed and raped the occupants. The Court noted that the decision to sever is left to the sound discretion of the trial court. Citing Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990). Moreover, it is well settled that when defendants have been indicted together they should be tried together absent compelling reasons to the contrary. Jones 899 P.2d at 547.

The argument presented to the Nevada Supreme Court in Jones, was that even though defendants Jones and Turner admitted to being at the victims apartment they denied any involvement in the crime and denied seeing the other commit any of the offenses. The claim of prejudicial joinder due to antagonistic defenses was expressly rejected by the Court. Id.

Essentially the same factual scenario is argued in this case, i.e., that we were there but the "other person did it". This attempt by Moore and Morris to obtain a severance based upon an attempt to minimize their involvement should be summarily rejected.

Another United States Supreme Court opinion consistent with the States position in the instant case is Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

In Richardson, defendants Marsh, Williams, and Martin were charged with assaulting Cynthia Knighton and murdering her 4-year-old son and her aunt, Ollie Scott. Williams and Marsh were tried jointly and the confession of Williams was introduced into evidence in redacted form. (Martin was a fugitive at the time of trial.) The confession was redacted to omit all reference to Marsh and all indication that anyone other than Martin and Williams participated in the crime. Williams did not testify at the trial. Marsh testified that she didn't know anything about the plan of Williams and Martin to rob and murder the victims and testified that during the robbery she did not feel free to leave and was too scared to flee. The conviction of Marsh was affirmed. The opinion Justice Scalia noted:

> It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability--advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.(footnote omitted) The other way of assuring compliance with an expansive Bruton rule would be to forgo use of codefendant confessions. That price also is too high, since confessions "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.
>
> Id. 481 U.S. 210, citing Moran v. Burbine, 475 U.S. 412, 426, 106 S.Ct. 1135, 1143, 89 L.Ed.2d 410 (1986).

Nevada follows these same general principles in determining whether or not to grant a motion for a severance. The defense has failed to show sufficient prejudice for this court to grant a motion for severance. The statements of the defendants' have been redacted to remove even the mention or the existence of the other thereby sufficiently removing perceived prejudice. Additionally, the jury can be instructed to consider each defendants' statement only against the defendant making the statement. The state has other evidence to present which links the two defendants together. Thus, as in Richardson v.

Marsh, supra, the "Bruton" rule will not be broken or the defendants constitutional rights denied. See U.S. v. Edwards, 159 F3d 1117 (8th Cir. 1998), where use of codefendant redacted statements were approved.

B. EACH DEFENDANT POINTING THE FINGER AT THE OTHER IS INSUFFICIENT TO SERVE AS A BASIS FOR SEVERANCE.

The defense claims this Courts predecessor failed to consider the other prejudice which would exist at a joint trial of these defendants. See defendant Morris' renewal of his motions to sever and suppress at p.2. The State is at somewhat of a loss as to what "other prejudice" the defense is alluding. In joining Mr. Morris's Motion to Sever, Mr. Moore claims that he will not be able to "confront his accuser" and thus be denied his Sixth Amendment rights. As discussed above, these arguments must fail because the statements of the defendants have been
sufficiently redacted to protect each defendant from incriminating the other through their respective statements.

The authority cited by the defense is not persuasive. The defense for Mr. Moore relies upon Stevens v. State, 634 P.2d 662, 97 Nev. 443 (1981), and Ewish v. State>, 871 P.2d 306
110 Nev. 221, (1994), for the proposition that admission of the defendant's statements to police would be grounds for reversal based upon a claim of "Bruton" error and approval of the multiple jury process respectively. The Nevada Supreme court in Ewish did approve of the multiple jury process used for trial of the three defendants but is otherwise not enlightening. In Stevens, supra, the Nevada Supreme Court reversed a conviction finding that prejudice existed based upon the fact that no limiting instruction was given to the jury regarding the codefendant's statement and the fact that redaction was apparently done by marking out the Stevens' name or leaving a blank where the jury could easily infer that Stevens name should be inserted into the blank. Stevens, 634 P.2d at 663. Those problems will not be presented in the instant case.

C. CHARACTER ASSASSINATION BY CODEFENDANTS

Next the defense claims that they should be able to introduce evidence of bad character in an effort to prove that "the other dude did it". Generally, the admission of character evidence is governed by NRS 48.045, NRS 48.055, and NRS 50.085. The State is subject to the same limitations as the defense.

Separate trials would not expand or restrict the rules of evidence to allow an unfettered attack upon the credibility of one of the defendants whether they testified or not. The State's position is that the defense will be precluded from presenting inadmissible character evidence thus obviating the need for severance based upon this ground. Further, in most multiple defendant cases, defendants attempt to shift the blame to the other codefendants, yet this issue is not grounds for severance. The defense has failed to cite any authority mandating severance based upon the assertion that one codefendant is more culpable than the other. In fact, Nevada case law is to the contrary regarding the "rub off effect". See Lisle v. State, 114 Nv. 221, 941 P.2d 459 (1997).

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

Deputy District Attorney

Joinder Co-defendants Short Form

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION FOR JOINDER OF DEFENDANTS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Joinder of defendants is proper where the defendants are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

In the instant case, the defendants have been charged with murder and kidnapping and as co-conspirators. Clearly, the Information alleges that the defendants, and each of them participated in the same act or transaction or same series of acts or transactions. Thus, joinder is proper. See Amen v. State, 106 Nev. 749, 801 P.2d 1354 (1990).

CONCLUSION

The State respectfully requests that case number

CR be joined with CR .

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Joinder Multiple Counts Same Defendant

CODE
Richard A. Gammick
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P.O. Box 30083
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Is joinder of the three counts contained in the Indictment proper, pursuant to NRS 173.115?

NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are: (1) based on the same act or transaction; or (2) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Under Nevada law, as currently set forth in NRS 173.115, the State has properly joined the three counts contained in the Indictment as all three crimes are connected together as they constitute a common scheme or plan of the defendant. The Nevada Supreme Court has upheld the joinder of several crimes within one charging document and many recent cases. In one recent case, Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996), the Nevada Supreme Court held that two vehicle burglary counts were properly joined with each other and with a separate store burglary count in light of the trial court's possible determination that vehicle burglaries were part of a common scheme or plan. The common plan was evidenced by the fact that both crimes occurred in casino parking garages only seventeen days apart and the trial court's possible determination that the store burglary was connected together with one of the vehicle burglaries as evidenced by the detective's observation of the defendant burglarizing a vehicle then proceeding into the store from which appellant stole a lock. Id.

The facts of Tillema are as follows: James Tillema was arrested for a burglary of a vehicle on May 29, 1993, and was arrested again for another burglary of a vehicle and for burglary of a store on June 16, 1993. As a result, he was charged with a total of three counts of Burglary pursuant to NRS 205.060, as well as two counts of Possession of Burglary Tools pursuant to NRS 205.080. At trial, the jury convicted Tillema on all counts. On appeal, Tillema asserts as one issue for appeal, the district

court's failure to grant his motion to sever the counts and admission of evidence of a prior crime. Tillema claimed that the vehicle burglary counts were improperly joined with each other and with the store burglary count.

The Supreme Court held that NRS 173.115 provides that two or more offenses may be joined together in a separate count for each offense if the offenses charged are "based on the same act or transaction," "connected together," or constitute a "common scheme or plan." Id 112 Nev. at _____, 919 P.2d at 606. The Supreme Court cited Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989) for the proposition that "if evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." "It is the established rule in Nevada that joinder decisions are within the sound discretion of the trial court and will not be reversed absent an abusive discretion." Id. Citing Robbins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990), cert. denied, 499 U.S. 970, 111 S.Ct. 1608, 113 L. Ed. 2d 670 (1991).

The Supreme Court concluded that the district court did not abuse its discretion allowing the two vehicle burglary counts and store burglary count to be joined together. Moreover, the Nevada Supreme Court concluded that evidence of the May 29th offense would certainly be cross-admissible in evidence at a separate trial on the June 16th offense to prove Tillema's felonious intent in entering the vehicle. Id. Also See NRS 48.045(2) and Mitchell, 105 Nev. at 738, 782 P.2d at 1342.

The Nevada Supreme Court followed its reasoning as set forth in Tillema and Mitchell, supra, in another recent decision supporting the State's position, in Graves v. State, 112 Nev. 118, 912 P.2d 234 (1996). In Graves, the defendant claimed that two burglary charges were improperly joined in the Information. The first charge of burglary related to an alleged attempt to steal money from a patron of the Fremont Casino. A second charge related to an alleged effort to steal money from a cashier's booth. Graves' argued that the two acts did not represent a common scheme or plan or involve the same act or transaction as required by NRS 173.115. He claimed that the proof presented at trial regarding his intent to steal from the cashier's booth was highly prejudicial to the charged intent to steal at the Fremont, given the lack of evidence that he actually stole anything at the Fremont. The Nevada Supreme Court held that the district court did not abuse its discretion in allowing the two charges to be joined because the two charged

offenses were part of a common scheme or plan and factually connected. Id 112 Nev. at _____, 912 P.2d at 239, 240. Citing, State v. Boueri, 99 Nev. 790, 672 P.2d 33 (1983).

Another case supporting the State's position is Shannon v. State, 105 Nev. 702, 783 P.2d 942 (1989). In Shannon, the appellant was convicted of having sex with two minor boys, minor A and minor L. The record showed that Shannon had developed an intricate scheme to provide himself with access to young boys for the purpose of eventually molesting them. This scheme involved the formation of a canoe club comprised of young boys around the age of thirteen. One of the issues raised on appeal by appellant, was the joinder of the cases involving minor A and minor L. Appellant was charged with two counts of lewdness with a minor upon child L and eleven counts of sexual crimes involving minor A. Appellant claimed that the two cases were not proper for joinder because they failed to meet the criteria set forth in NRS 173.115. Appellant claimed that the incidents involving minor A and minor L were distinct in nature and time and that joinder of the two cases created significant prejudice. The court held that although the crimes occurred at a different time and place, they were part of a common scheme or plan devised by appellant, Shannon. The common scheme or plan was evident by the identical modus operandi utilized by Shannon with each victim. The court found that since the victims were members of Shannon's canoe club, both boys were victims of sexual crimes perpetrated by Shannon while on canoe outings and that they were of the same age group that the criterion of a common scheme or plan was sufficiently satisfied. The court went on to state that "joinder is within the discretion of the trial court and will not be reversed absent an abuse of that discretion." Citation omitted, Shannon, 105 Nev. at 786, 783 P.2d at 944.

In Mitchell v. State, 105 Nev. 735, 782 P.2d 1340 (1989), the Nevada Supreme Court held that the district court erred in failing to grant the defendant's motion to sever grand larceny and sexual assault counts involving Mary Beth Petts (Petts), and sexual assault and murder counts involving Jacqueline Brown (Brown). The incidents involving victim Petts occurred forty-five days prior to the incidents involving victim Brown. The two incidences did not appear to be connected except that appellant, Mitchell, took the two women dancing and drinking at the same bar and is alleged to have sexually assaulted both women. The Nevada Supreme Court found that the taking of the two different women dancing and later attempting intercourse could not be considered part of a common scheme or plan.

The court did state "if, however, evidence of one charge would be cross-admissible in evidence at a separate trial on another charge,

then both charges may be tried together and need not be severed." Id, 105 Nev. at 738, and 782 P.2d at 1342.

The court went on to state that evidence of prior bad acts such as Mitchell's acts involving Petts is admissible only if: (1) The prior acts are relevant to the crime charged because they show motive, intent or other material element listed in NRS 48.045(2); (2) The prior acts are proved by clear and convincing evidence; and (3) The prior acts are more probative than prejudicial. Citation omitted. The court stated that the district court erred in denying the severance motion because the alleged sexual assault of Petts was marginal because Petts was drunk or tired and she did not even remember having sex with appellant, Mitchell. The Supreme Court concluded that the evidence of the prior sexual assault of Petts was not proved by clear and convincing evidence and should not have been admitted. Id.

However, the Supreme Court in Mitchell, went on to state that "error due to misjoinder requires reversal only if the error has a 'substantial and injurious affect or influence in determining the jury's verdict'" Id 105 Nev. 738, 739, 782 P.2d 1342 and 1343. The court concluded that the error in failing to sever did not have a substantial or injurious affect or influence on the jury.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

02239661

Joinder Multiple Counts Same Defendant II

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

As the Nevada Supreme Court held in Mitchell v. State, 105 Nev. 735, 738 (1989), "if...evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Such is the case for joinder before this Honorable Court.

NRS 48.045(2) provides that evidence may not be admissible to show that the defendant acted in conformity therewith, but may be admissible for other purposes such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. See Petrocelli v. State, 101 nev. 46 (1985).

The District Court must conduct a hearing outside the presence of the jury to determine if the conditions are met. Id. at 52-53. Admission of collateral acts evidence is "within the court's sound discretion" and will not be disturbed on appeal unless it is "manifestly wrong." Id. In addition, such a hearing must be conducted on the record with the court stating its findings of fact and conclusions of law at the conclusion of the hearing. Armstrong v. State, 110 Nev. 1322, 1325-26 (1994). Evidence is relevant if it is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015.

By pleading "not guilty", the defendant put in issue every material allegation of the Information. Overton v. State, 78 Nev. 198 (1962) See, Williams v. State, 95 Nev. 830, 833 (1979). Evidence of an essential element is therefore permissible in the State's case in chief. Overton, supra, at 205-06. If evidence of a particular element of the crime involved is not otherwise substantially established, receiving evidence of other acts to prove that element is justified by necessity, and the trial court should be

convinced that the probative value of such evidence outweighs its prejudicial effect. Tucker v. State, 82 Nev. 127, 130 (1966). See also, Williams, supra, at 833-34.

In the instant case, the prior dealings by the defendant are relevant and admissible in that the acts tend to prove intent to possess and sell a controlled substance. Wallace v. State, 77 Nev. 123 (1961); Overton, supra

Evidence of other acts in each case is also relevant as to proving knowledge of the narcotic nature of the controlled substance. Wallace v. State, 77 Nev. 123 (1961); Overton, supra.

Finally, NRS 173.115 states offenses may be joined in a single information if the two acts or transactions constitute a common scheme or plan. As stated above, the facts of the defendant's two cases are virtually identical clearly evincing a common plan or scheme to sell rock cocaine.

Joinder is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. See Lovell v. State, 92 Nev. 128 (1976). Joining two identical offenses is in no way an abuse of discretion.

III. CONCLUSION

"...Joint trials serve the public interest by expediting the administration of justice, reducing docket congestion, conserving judicial time as well as that of jurors along with avoiding the recall of witnesses to duplicate their performances." Jasch v. State, Wyo., 563 P.2d 1327, 1335 (1977). Clearly, the two cases are cross-admissible enabling a joinder of the two informations.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Joinder Multiple Counts Same Defendant III

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

As the Nevada Supreme Court held in Mitchell v. State, 105 Nev. 735, 738 (1989), "if...evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Such is the case for joinder before this Honorable Court.

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convinced that the probative value of such evidence outweighs its prejudicial effect. Tucker v. State, 82 Nev. 127, 130 (1966). See also, Williams, supra, at 833-34.

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Evidence of other acts in each case is also relevant as to proving knowledge of the narcotic nature of the controlled substance. Wallace v. State, 77 Nev. 123 (1961); Overton, supra.

Finally, NRS 173.115 states offenses may be joined in a single information if the two acts or transactions constitute a common scheme or plan. As stated above, the facts of the defendant's two cases are virtually identical clearly evincing a common plan or scheme to sell rock cocaine.

Joinder is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. See Lovell v. State, 92 Nev. 128 (1976). Joining two identical offenses is in no way an abuse of discretion.

III. CONCLUSION

"...Joint trials serve the public interest by expediting the administration of justice, reducing docket congestion, conserving judicial time as well as that of jurors along with avoiding the recall of witnesses to duplicate their performances." Jasch v. State, Wyo., 563 P.2d 1327, 1335 (1977). Clearly, the two cases are cross-admissible enabling a joinder of the two informations.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Judgment of Acquittal

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____

(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

POINTS AND AUTHORITIES

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

For Appe11ate review of evidence supporting a jury's verdict, the question is not whether the Court is convinced of the defendant's guilt beyond a reasonable doubt or not, but whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider. ~ Wilkins v. State, 96, Nev. 367, 375 (1980) . Plaintiff hereby submits that the test in the instant matter is the same under NRS 175.381(2). By also quoting this language, defendant appears to be in agreement. See also Dorman v. State, 622 P.2d 448, 453 (Ak. 1981) However, defendant asks this Court to usurp the jury's constitutionally mandated ability to determine guilt or innocence. She requests a finding from the Court that as a matter of law the evidence in this case was insufficient for a jury, acting reasonably, to convict her of Battery With A Deadly Weapon, a general intent crime.

NRS 175.381(2) permits the Court to enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. Insufficiency of the evidence occurs only when the prosecution has not produced a minimum threshold of evidence upon which a conviction could be based. State v. Walker, 109, Nev.Ad.Op. 104 (July 27, 1993). In other words, even if the State's evidence presented at trial was believed by the jury, it would still be insufficient to sustain a conviction. State v.
Walker supra. This would then require a release of the defendant and would be an absolute bar to a subsequent prosecution. State

v. Walker supra; State v. Wilson, 104 Nev. 405 (1988)

From the outset, this case has presented interesting and somewhat unique questions of fact for the trier of fact-a jury-eventually to decide. In this sense and in recognizing the role of the jury, our Supreme Court has stated, Judges possess no unique faculties for perceiving relationships, discerning contradictions, drawing inferences, and making measured judgments. Edwards v. State, 90 Nev. 255, 259 (1974) . It is for the jury to determine the weight and ability to give conflicting

testimony. Bolden v. State, 97 Nev. 71 (1981); Stewart v. State, 94 Nev. 378, 379 (1978) . The jury is certainly at liberty to reject the defendant's version of the events. Harris v. State, 88 Nev. 385 (1972); See also, Glegola v. State, 110 Nev. Ad.Op. 43 (March 30, 1994) ; Rice v. State, 108 Nev. 43, 45 (1992) With all due respect to this Honorable Court, its judgment (whether different or not) should not simply be substituted for that of the jury.

NRS 175.381(2) clearly was not enacted to give every defendant two separate opportunities for an acquittal. It was designed to permit the Court to remedy an injustice caused by a situation in which, as a matter of law, the evidence cannot sustain a conviction. If the evidence reasonably justifies the jury verdict, inferences that are also consistent with innocence will not warrant interference with the jury's verdict. State v. Rhodig, 101 Nev. 608, 612 (1985)

Recognizing that state of mind may be inferred from conduct and the facts and circumstances surrounding it, the Court in Rhodig supra, reversed the District Court's judgment of acquittal and ordered the jury's guilty verdict be reinstated. Even in a situation in which the conviction is based entirely on circumstantial evidence, the theory that the jury's verdict cannot be supported if the evidence is as consistent with innocence as with guilt has long ago been laid to rest by many courts including the Ninth Circuit Court of Appeals. Evidence equally consistent with innocence as with guilt does not require granting a motion for judgment of acquittal. Schino v. U.s., 209 Fed.2d. 67, 72 (9th, 1954)

Judgment of acquittal should be entered only when there is no evidence from which a trier of fact could render a verdict of guilty. State v. Lyons, 838 P.2d 397 (Mont. 1992); State v. Webster, 824 P.2d 768, 770 (Ariz. App. 1991). The evidence must be reviewed in the light most favorable to the State. See Dorman v. State, supra. "The Court should not grant a motion for acquittal when reasonable minds could differ on the inferences to be drawn from the evidence." State v. Webster, supra.

Jury Consultant Expert Witness

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

A court's refusal to permit a parties expert witness to sit at counsel table has been upheld on appeal. UAW v. Michigan, 886 F.2d 766, 771 (6th Cir. 1989).

The instant motion cites to a generalized authority of effective assistance at counsel pursuant to the Sixth Amendment of the United States Constitution. In Re: Lord, 868 P.2d 835, (Wash. 1994) 855 the Supreme Court of Washington held that a defendant was not entitled to a jury consultant during the selection of a jury in a capital case at public expense.

CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

_____

Deputy District Attorney

Jury Instruction Lesser Included Offenses

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

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DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

> Robbery is defined as:
> The unlawful taking of personal property from the person of another, or in his presence, against his will by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
> (a) obtain or retain possession of the property;
> (b) prevent or overcome resistance to the taking; or
> (c) facilitate escape.

NRS 200.380.

Under the facts set forth above the defense is not entitled to a lesser included or a lesser related instruction on petty larceny. In this case, the taking was by means of force and violence, force and violence were used to retain possession

of a property; prevent or overcome resistance to the victim's retaking the property and facilitate escape.

In order for the defense to be entitled to a jury instruction on a lesser related offense three conditions must be satisfied: 1) the lesser offense must be closely related to the offense charged; 2) the defendant's theory of the defense must be consistent with the conviction for the related offense; and 3) evidence of the lesser offense must exist. See Davis v. State, 110 Nev. 1107, 881 P.2d 657 (1994). In the instant case the defense fails to meet the second condition that is theory of defense is consistent with the conviction for the related offense. If the defense's position is that the offense is merely a petty larceny coupled with a battery then he has admitted the elements of a robbery and the jury should not be instructed on a lesser included offense. The State's position has also been confirmed by the Nevada Supreme Court in Graham v. State, supra. In Graham, the defendant was convicted of First Degree Murder of a theory of child abuse. The defense sought an instruction on the lesser included offense of Second Degree Murder and Voluntary Manslaughter. The Nevada Supreme Court held that the defendant was not entitled to the

lesser included offense instruction since none of the facts of the case and the law governing murder, the defendant could only be convicted of First Degree Murder, that is murder as a result of child abuse or nothing. Likewise, under the facts of this case the defendant can only be convicted of robbery or nothing. The defense cannot dispute the fact that the battery occurred while the defendant was in possession of the property, was attempting to retain possession of the property and used violence to make good his escape with the property.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Juror Disqualifying Certain Groups

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO DISQUALIFY CERTAIN POTENTIAL JURORS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NO LEGAL BASIS EXISTS TO DISQUALIFY THE TWO GROUPS OF POTENTIAL JURORS OUTLINED IN THE INSTANT MOTION

The instant motion requests that two groups of persons be automatically excluded as jurors in this case. Specifically, anyone attending or employed at the University of Nevada in January of 1998 and any person "involved with" or whose family members that are "involved" in law enforcement.

AUTHORITIES CITED IN THE INSTANT MOTION ARE FACTUALLY AND LEGALLY DISTINGUISHABLE

The instant motion cites to several Nevada Supreme Court decisions as authority for the relief requested herein. The first, State v. Kelley, 1 Nev. 188 (1865) found that a juror was properly excused because they had previously sat on the Grand Jury that had indicted the defendant.

The second case, State v. McNeil, 53 Nev. 428, 4 P2d 889 (1931) the court held that it was proper to excuse a juror who stated during voir dire that he was prejudiced and could not be impartial to both the State and the defendant and that the prejudice would remain with him during the trial. Further, the juror indicated that if he were in the position of the State or the defendant he would not care to be tried by a jury composed of twelve persons in his frame of mind. The court concluded, "we cannot conceive of a more complete disqualification of a trial juror than appears from the answers of this venireman as shown by the record." Id. at 440.

In the next case, State v. Buralli, 27 Nev. 41 (1903) the court upheld the exclusion of a juror who expressed reluctance to vote for the death penalty. During the voir dire process, after expressing his opinion against capital punishment, the defense counsel traversed the State's challenge for cause about his negative feelings. The Court sustained the challenge. On appeal, the Nevada Supreme Court held that the trial court is in the best position to determine whether the condition of a jurors mind is such that he could be nothing but a fair and impartial juror. Contrary to the two classes of individuals sought to be excluded in this motion, no finding has been made that those individuals could be anything but fair and impartial. In Bryant v. State, 72 Nev. 330, 305 P.2d 360 (1956), the court reviewed the examination of a juror who had initially expressed an opinion that he could not be fair and impartial based upon the facts as she had read them previously in a newspaper article. Upon closer examination by the Court and the State, the juror indicated that if the testimony presented in Court was different from that contained in the newspaper article they could put their previously held opinion aside and act fairly and impartially upon the evidence. The Court in Bryant concluded that the jurors mind "should be determined from the whole of the examination" and any doubts resolved in favor of the accused. Unfortunately, there has been no showing at all that any of the two groups outlined in the instant motion have formulated any opinion whatsoever that would cause them to be anything but a fair and impartial juror, let alone, have an opinion as strong or preconceived as the one set forth in Bryant.

In all of the authorities cited by the defense, there has been a specific opinion expressed by an individual juror as to concerns about their fairness and impartiality. That fact is significantly distinguishable from the remedy currently sought by this motion. To analogize those cases to the request that any one attending or employed by the University in January of 1998, and all persons "involved with" law enforcement should be "summarily discharged" as potential jurors is a novel and unsupported legal contention.

Even if a juror were to express an opinion, one way or another in this case, that would not be a basis to automatically disqualify the juror at that juncture. The law contemplates further examination during the voir dire process to adequately and fully explore the extent and nature of the "opinion" the potential venire person has expressed. For example, in Snow v. State, 101 Nev. 439, 705 P.2d 632 (1985),

two jurors had expressed an opinion of the defendant's guilt from exposure to news and media accounts of the crime. They further expressed that their opinions were not "unqualified" and upon further examination indicated that they could set aside their previous opinions and keep an open mind until a verdict was reached. The Nevada Supreme Court, upon appellate review concluded that the District Court did not err in refusing to exclude these two jurors for cause based upon their previously formed opinion.

CONCLUSION

The instant motion fails to cite to any cognizable authority that stands for the proposition that generalized groups of people are automatically disqualified in this case. There is no factual basis to claim that people who attend or who were employed at the University of Nevada in January of 1998, and/or persons "involved with" law enforcement should be summarily discharged for cause. In fact, the Nevada Supreme Court has indicated that even if a juror has previously expressed an opinion as to the guilt or innocence of the defendant, further examination is appropriate before determining whether or not "just cause" exists for there exclusion. Therefore, the defendant has failed to meet its burden in sustaining the remedy in this motion.

DATED this _____ day of _____, .

_____
RICHARD A. GAMMICK
District Attorney

_____
Deputy District Attorney

Juror Full Disclosure of Background

CODE
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION FOR ALL BACKGROUND PROSPECTIVE JURORS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

During the State's extensive research on this issue, it was unable to find any authority that would compel the State to disclose information to the defense to conduct voir dire. Further, no authority has been found that would indicate that a "level playing field" or principles of "fairness" requires litigants to be on the same playing field regarding information about potential jurors.

It is patently obvious that the defense community, and more specifically the Public Defender's Office, would have access to information about potential jurors that the District Attorney's Office would be unable to access or obtain. That fact
alone does not warrant or compel the Public Defender's Office to obtain that information or disclose that to the State. Obviously, the converse is equally true.

The authority of this Court to compel the State to produce information to the defense is derived from NRS 174.235, et seq., Brady v. Maryland, 373 U.S. 82 (1963). No authority exists for this Court to order the disclosure of information and/or the work product of the State. "Work product" defined as both "fact work-product" and "opinion work-product." In re Grand Jury Proceedings, 102 F.3d 748, 750 (4th Cir., 1996).

Further, a generalized reference to "constitutional principles involving due process and equal protection" is insufficient to establish credible authority supporting the relief requested.

In conclusion, the defendant cites no authority for the legal proposition and remedies sought in this case, to wit, that the State be compelled to disclose information that it may have regarding

potential jurors that is unavailable to the defense. That same proposition is equally true of the information in possession of the Washoe County Public Defender's Office. No more compelling fact exists to show that the argument is without merit in that no authority exists in the form of either statutory or case law to support the proposition in the instant motion. For that reason, the motion should be denied in its entirety.

Dated this _____ day of _____, .

_____

RICHARD A. GAMMICK
District Attorney

_____

Deputy District Attorney

Juror Challenge Religion Batson

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Counsel for the defendant requests that this Court enter an order precluding the State from challenging any potential juror on the basis of their religion. Making this request, counsel argue that Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny, should be extended to prevent such challenges. The State respectfully submits that the Court can address the concerns set forth in the defendant's motion without entering the requested order.

The State does not intend to ask any potential juror what their religion is. One would have to assume because of this motion that the defendant would also agree to this restriction. If such questions are voided, the only indication of religious preference would be provided by the potential jurors. If this occurs, the State agrees that a decision concerning whether that person should serve as a juror must not be based upon their religious association. This is not to say that a person should not be excluded for other valid reasons.

If a potential juror makes reference to their religion, it is most likely to demonstrate their high degree of commitment to a belief or position they have stated. If a person maintains a belief or an attitude which prevents or substantially impairs them from performing their duties as a juror, they can be and should be challenged. Easoph v. State, 102 Nev. 316, 319 (1986).

It does not matter what causes a person to maintain a belief or attitude which prevents their performing their duties as a juror. If they cannot set those beliefs or attitudes aside and act impartially and fairly, they should not be jurors. Hess v. State, 73 Nev. 175 (1957). A position which has its basis in a person's religion may be more firmly held than a belief based upon other factors. So long as the reason for the challenge focuses upon the ability or inability to perform the duties of a juror, and not upon the

underlying basis, the challenge is appropriate. If fact, to ignore a strong belief that prevents a person from acting as a juror would be improper.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Juror Misconduct Verdict Overturned by Court

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

THE CONCLUSIONS OF LAW REACHED BY THIS COURT DO NOT CONSTITUTE SUFFICIENT LEGAL BASIS FOR SETTING ASIDE THE VERDICT OF THE JURY AND ORDERING A NEW TRIAL.

Basis 1 - Juror Misconduct - Use of Dictionary

The Court found that a dictionary was brought to the proceedings, that it did not constitute misconduct *per se*, but that it should be considered along with the other conclusions of law as support for the granting of a new trial. Order, December 24, 1998, p.4. It was noted during a hearing on the matter, that the terms malice and malicious were marked.

The Court cites to Granite Construction Company v. Rhyne, 107 Nev. 651, 817 P.2d 711 (1991). In that case, Granite claimed error because the judge had allowed the jury to take a dictionary into the room, stating, in part, that the court had examined the pertinent words and found nothing inconsistent with the court's instructions. 107 Nev. at 652.

In the case at bar, when it was brought to the Court's attention that a juror had attempted to bring a dictionary into the jury room, the foreperson was brought into open court and admonished as follows:

> THE COURT: I admonish you again that you're restricted to the use of legal instructions that I gave you, and you can't utilize outside sources. Anything you might have heard or discussed about that is to be disregarded and admonished not to consider, okay?
>
> FOREMAN KELTNER: Yes.

Transcript of the Trial, Volume IV, p.649, ll. 8 -15.[14]

The admonishment provided by the Court, which was agreed to by counsel for both parties, is sufficient to absolve any "taint" of the dictionary's influence as an outside source. There is nothing in the record, including the affidavits provided

by defendant, that would lead this Court to believe that its admonishment was not followed.[15]

Basis 2 - Juror Misconduct "Prejudicial External Information"

It is the State's contention that the foreperson's behavior, even if assumed true, goes directly to the deliberative process and should not be considered by the Court pursuant to NRS 50.065(2)(a)(b)(statements which go to the effect of anything upon the state of mind of a juror in reaching the verdict are inadmissible); see also, Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997).

Questions relating to jury polling and the jury's understanding of the court's instructions go to the deliberative process. In Johnson v. State, 593 So.2d 206 (Fla. 1992), the Florida Supreme Court held that the testimony of the foreperson about polling during deliberations and the jury's understanding of the court's instructions was inadmissible. It stated: "This testimony essentially inheres in the verdict as it relates to what occurred in the jury room during the jury's deliberations." 593. So.2d at 210.

Similarity, post-verdict claims of coercion or hostility have also been held inadmissible. See, U.S. v. Moses, 15 F.3d 774 (8th Cir. 1994)(court properly declined to investigate a juror's reports of hostility during deliberations and his post verdict belief that the defendant was innocent as reflecting the juror's thought processes); United States v. Miller, 806 F.2d 223 (10th Cir. 1986)(holding that juror's second thoughts about a verdict do not necessitate further inquiry or a new trial).

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[14]It should be noted that the Court admonished the foreperson a second time, after additional questioning by Ms. Pusich. See, Transcript of the Trial, November 19, 1998, p. 650, ll. 2 - 7.

[15]The affidavits of the following jurors make it clear that the admonishment of the Court was considered and that the dictionary definitions did not affect the verdict. See,

There exists a strong policy basis for rejecting attempts by jurors, lawyers and others to impeach verdicts. Freedom of deliberative thought and action is central to the institution of trial by jury. This institution is endangered by delving into the deliberative process.

> Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled... The most frequently discerned source of pressure is relentless questioning by litigants ... [E]xposure of jury deliberations brings to light not only differences of opinions among jurors, but also decisional premises with which various members of the public are bound to disagree. Like any fact finder, the jury has as one of its chief aims the "authoritative resolution" of disputes in a world that is rarely black and white. If the public is to be persuaded to entrust controversies to the judicial system, what is crucial, even more than that the truth be found, is that it appear to be found through a legitimate, reliable process; as long as the ultimate determination of closely contested issues continues to depend on jury verdicts, the law has an obligation to maintain general respect for those verdicts, to avoid exposing them to easy and obvious criticism.

Public Disclosures of Jury Deliberations, 96 Harv.L.Rev. 886, 891 (1983)(emphasis added).

The United States Supreme Court has recognized, in accordance with the above-cited analysis, that there is a substantial policy interest in insulating the jury's deliberative process as well as enforcing the common-law rule that prohibits the admission of a juror's testimony to impeach its verdict. Furthermore, the United States Supreme Court has recognized that other sources of protection exist to ensure a competent jury, which do not intrude into the jury's domain. Specifically, "jurors are observable by each other and may report inappropriate juror behavior to the court *before* they render a verdict." Tanner v. U.S., 483 U.S. 107, 127, 107 S.Ct. 2739 (1987)(emphasis added). Based upon the above analysis, claims regarding the deliberative process, especially from a clearly disgruntled juror, with 'buyer's remorse" should not be considered

Every authority cited in the instant motion has, as a factual predicate, the existence of some cooperation by the defendant that was fully performed prior to the State attempting to withdraw from negotiations. No such fact exists in this case nor can one be claimed by defense counsel.

The Nevada Supreme Court has held, "the greater weight of authority supports the state's contention that a prosecutor can withdraw a plea bargain offer any time before a defendant pleads guilty, so

long as the defendant has not detrimentally relied on the offer." State v. Crockett, 110 Nev. 838 (1994) ("detrimental reliance," a legally defined term, requires a material inability for the defendant to defend his case). The Ninth Circuit Court of Appeals has held that either a defendant or the State may withdraw its consent to a plea bargain until the Court has accepted the defendant's plea. United States v. Washman, 66 F.3d 210 (9th Cir. 1995).

The United States Supreme Court has held, "a plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the constitution." Mabry v. Johnson, 467 U.S. 504, 507-08, 104 S.Ct. 2543, 2546-47 (1984). The Mabry Court went on to hold "neither is the question whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing his offer relevant. The due process clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." Id., at 511, 104 S.Ct. at 2548.

> Other Courts are unanimously in accord with the authority cited above. For example, "[t]hus, the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court."

United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980), cert. denied, 451 U.S. 984, 101 S.Ct. 2316 (1981); see also, United States v. Papaleo, 853 F.2d 16, 20 (1st Cir. 1988); Spann v. Wainwright, 742 F.2d 606 (11th Cir. 1989).

CONCLUSION

Jury Qualifying for Death Penalty

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

RESPONSE TO MOTION TO AVOID DEATH PRONE JURY

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)

Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

COUNSEL'S ENTITLED TO LIFE AND DEATH QUALIFY THE JURY

The United State Supreme Court has stated that a prospective juror whose individual views would prevent or substantially impair, the performance of a juror and their ability to impose the death penalty or a penalty other than death, must be excluded for cause. Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985) (emphasis added).

The above-stated provision has been specifically adopted by the Nevada Supreme Court in Aesoph v. State, 102 Nev. 316 (1986). Thus, the State is not in disagreement with the conclusions stated in the instant motion, that is, counsel's entitled to "life" and "death" qualify potential jurors. The key operative language as highlighted above is whether a person's view of the death penalty would "prevent or substantially impair" their performance or the duties as jurors at the sentencing phase of the trial.

In fact, in Aesoph the Court addressed a similar issue as that being brought in the instant motion. The Court held: "Aesoph next contends that the removal for cause of persons of the distinct sizable group, the 'Witherspoon-excludables' i.e., persons who because of their attitudes and belief are unalterably opposed to the death penalty, violated his rights under the Six and Fourteenth Amendments to a jury selected from a representative cross-section of the community." Aesoph, 102 Nev. at 318. The Court went on to hold that "Witherspoon-excludables" are properly removed for cause because their beliefs prevent or substantially impair their ability to perform one of their duties as jurors, to wit, to follow the law. Id. at 318. Concluding the Court held, "[w]e hold that a person's constitutional right to a fair trial is not violated by the removal for cause, prior to the guilt phase of a bifurcated capital trial, of perspective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as duties at the sentencing phase of the trial." Id. at 318.

DATED this _____ day of _____, .

RICHARD A. GAMMICK

District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Jury Trial Misdo Offense

CODE
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The Supreme Court of the United States has long held that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." Duncan v. Louisiana, 391 U.S. 145, 159, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968). In determining whether or not a crime is "petty" the Supreme Court has found that the most relevant criterion is the severity of the maximum authorized penalty fixed by the legislature. Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

In evaluating this criteria the Supreme Court has held that: "a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." Blanton v. City of North Las Vegas, Nevada, 489 U.S. 538, 542, 109 S.Ct. 1289, 1293, 103 L.Ed.2d 550 (1989). The Supreme Court recognizes that a prison term of six months or less "will seldom be viewed by the defendant as 'trivial or petty.' " Baldwin, at 73, 90 S.Ct., at 1890. But the Supreme Court has found that the burdens of such a sentence, "onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." Ibid.; see also Duncan, *supra*, 391 U.S., at 160, 88 S.Ct., at 1453.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

012025922

Lesser Included Offenses Jury Instruction

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

> Robbery is defined as:
> The unlawful taking of personal property from the person of another, or in his presence, against his will by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
> (a) obtain or retain possession of the property;
> (b) prevent or overcome resistance to the taking; or
> (c) facilitate escape.

NRS 200.380.

Under the facts set forth above the defense is not entitled to a lesser included or a lesser related instruction on petty larceny. In this case, the taking was by means of force and violence, force and violence were used to retain possession

of a property; prevent or overcome resistance to the victim's retaking the property and facilitate escape.

In order for the defense to be entitled to a jury instruction on a lesser related offense three conditions must be satisfied: 1) the lesser offense must be closely related to the offense charged; 2) the defendant's theory of the defense must be consistent with the conviction for the related offense; and 3) evidence of the lesser offense must exist. See Davis v. State, 110 Nev. 1107, 881 P.2d 657 (1994). In the instant case the defense fails to meet the second condition that is theory of defense is consistent with the conviction for the related offense. If the defense's position is that the offense is merely a petty larceny coupled with a battery then he has admitted the elements of a robbery and the jury should not be instructed on a lesser included offense. The State's position has also been confirmed by the Nevada Supreme Court in Graham v. State, supra. In Graham, the defendant was convicted of First Degree Murder of a theory of child abuse. The defense sought an instruction on the lesser included offense of Second Degree Murder and Voluntary Manslaughter. The Nevada Supreme Court held that the defendant was not entitled to the

lesser included offense instruction since none of the facts of the case and the law governing murder, the defendant could only be convicted of First Degree Murder, that is murder as a result of child abuse or nothing. Likewise, under the facts of this case the defendant can only be convicted of robbery or nothing. The defense cannot dispute the fact that the battery occurred while the defendant was in possession of the property, was attempting to retain possession of the property and used violence to make good his escape with the property.

CONCLUSION

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

Lewdness Unconstitutionally Vague

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

IN THE MATTER OF THE APPLICATION

OF FOR Case No. CR

A WRIT OF HABEAS CORPUS. Dept. No.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and , Deputy District Attorney, and hereby responds to the Petition for Writ of Habeas Corpus in the above- entitled matter. This response is based upon the following Points and Authorities.

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

NRS 201.230 Unconstitutionally Vague as Written.

Petitioner contends that NRS 201.230 is unconstitutionally vague as written. The statute does not contain a sufficient definition of the word, "lewd." Therefore, petitioner contends that this Honorable Court should dismiss Count I of the Information which alleges lewdness with a child under the

age of 14 years in violation of NRS 201.230. Petitioner fully realizes that the Supreme Court of Nevada addressed the vagueness issue as it pertains to the word lewd and the lack of statutory definition of that word. The Court in Summers v. State, 90 Nev. 180, 521 P.2d 1228 (1974), held that NRS 201.230 was not constitutionally infirm because the legislature failed to define the term lewd in this statute. The Court said, "(W)hile 'lewd" is not specifically defined in our statutes, the word conveys sufficiently definite warning as to the proscribed conduct when measured by common understandings and practices." Summers v. State, 90 Nev. at page 182, 521 P.2d at page 1228. Further, the Court went on to hold that, "(T)he Constitution requires no more." Summers v. State, 90 Nev. at page 182, 521 P.2d at page 1228. Additionally, the Supreme Court of Nevada has held that, "(A)cts of the Legislature are presumed to be constitutional, and the party challenging an enactment bears the burden of making a clear showing of invalidity." Further, the Court held that "(W)here the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute to effectuate rather than nullify its manifest purpose." Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). Also, the Court has held that the Due Process Clause does not require, "an impossible standard of specificity in our penal statutes,...." Skipper v. State, 110 Nev. 1031, 1033, 879 P.2d 732, 733 (1994).

It is clear that the Legislature intended to proscribe as criminal a variety of lewd conduct. Moreover, petitioner's attorney offered a definition of lewdness at the preliminary examination of "obscene or indecent." PET page 206, line 21. Further, the American Heritage Dictionary defines lewd as "obscene, indecent, or lustful." These definitions clearly fall within the common understanding and practices the Supreme Court of Nevada referred to in Summers, supra. Therefore, the term lewd as used in NRS 201.230, as thus defined, conveys a sufficiently definite warning as to the conduct the legislature intended to make criminal.

As a result, the State respectfully contends that the term lewd in NRS 201.230 is sufficiently certain to pass constitutional muster. Therefore, the State respectfully requests that this Honorable Court deny petitioner's request that Count I of the Information be dismissed because NRS 201.230 is vague as written.

Petitioner contends that NRS 201.230 is unconstitutionally vague and over broad in proscribing his specific conduct as criminal. The Supreme Court of Nevada has addressed this issue of whether or not a statute as applied to the particular conduct of a defendant is unconstitutional because applying it to that conduct is vague and over broad. As discussed herein above, the Court has held that, "(T)he Due Process Clause contained in the Fourteenth Amendment to the United States Constitution prohibits states from holding an individual criminally responsible for conduct which he could not reasonably understand to be proscribed." Skipper v. State, 110 Nev. at page 1033, 879 P.2d at page 733. Later, the Supreme Court of Nevada held that a "vague law is one which fails to provide persons of ordinary intelligence with fair notice of what conduct is prohibited and also fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement." State v. Richard, 108 Nev. 626, 629, 836 P.2d 622, 624 (1992).

IV. CONCLUSION

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

By_____

Deputy District Attorney

Lay Testimony as to Video Tape ID

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

In Rossana v. State, 113 Nev. Ad. Op. 38 (1997) the court stated:

> There is a plethora of federal juris prudence holding that lay witnesses opinion testimony is admissible where it identifies the
> defendant as the perpetrator of a crime from a surveillance video.
>
> United States v. Saniti, 604 F.2d 603, 604-605 (9th Cir. 1979). Generally, a lay witness may testify regarding the identity of a person depicted in a surveillance photograph "'if there is some basis for concluding the witness is more likely to correctly identify the defendant from the photograph than is the jury.'"
>
> United States v. Townes, 913 F.2d 434, 445 (7th Cir. 1990) (quoting United States v. Farnsworth, 729 F.2d 1158, 1160 (8th Cir. 1984)). In United States v. Barrett, 703 F.2d 1076, 1086 (9th Cir. 1986), the Ninth Circuit concluded that the opinion testimony of a lay witness would be particularly appropriate where the witness was familiar with the defendant at the time of the crime and the defendant's appearance had changed by the time of the trial.

In addition, as discussed by Rossana, in United States v. Jackman, 448 F.3d 1, 5 (1st Cir. 1995), the court held that testimony given by the defendant's ex-wife, identifying him in a poor quality bank surveillance photograph (in which his face was partially obstructed), was permissible. The Jackman court stated that "[h]uman features develop in the mind's eye over time. These [lay] witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of the defendant's normal appearance." Id. However, the Jackman court would not allow such

testimony where a photograph is deemed "so hopelessly obscured that the witness is no better suited than the jury to make the identification." Id

In discussing the foregoing, including Jackman, the Rossana court stated that the district court properly admitted lay opinion testimony regarding the identity of a person depicted on the surveillance video tape and in so doing stated, "the jury could see the quality of the video tape and presumably could judge the creditability of those witnesses assertions about the video."

Dated this _____ day of _____, .

RICHARD A. GAMMICK
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By_____

Deputy District Attorney

Legislation Repeal Effect

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

OPPOSITION TO MOTION TO DISMISS

COMES NOW, the State of Nevada, by and through counsel, RICHARD A. GAMMICK, Washoe County District Attorney, and , Deputy District Attorney, and hereby submits this Opposition To Motion To Dismiss. This Opposition is supported by these Points and Authorities, any papers and pleadings filed herein, and any argument or evidence which may be presented at a hearing on this matter.

POINTS AND AUTHORITIES

The defendant argues that the legislative enactment of NRS 453.332, in 1983, repealed, by implication, NRS 453.323. The United States Supreme Court, in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198 (1979), reaffirmed that it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." Batchelder, 442 U.S. at 122, 99 S.Ct. at 2203. (Citations omitted.) "Rather, the legislative intent to repeal must be manifest in the 'positive repugnancy between the provisions.'" Batchelder, 442 U.S. at 122, 99 S.Ct. at 2203. (Citations omitted.) The Supreme

Court found that the penalty provisions at issue were fully capable of coexisting because they applied to convictions under different statutes. Batchelder, 442 U.S. at 122, 99 S.Ct. at 2203. See, also, Thorpe v. Schooling, 7 Nev. 15 (1871):

> [R]epeals by implication are not favored; and if it be not perfectly manifest, either by irreconcilable repugnancy, or by some other means equally indicating the legislative intention to abrogate a former law, both must be maintained.

Thorpe v. Schooling, 7 Nev. at 17-18.

The statutes at question here do not contain provisions that are so repugnant. Indeed, the Nevada Supreme Court, in Paige v. State, 116 Nev. Adv. Op 21 (2000), recently found that "NRS 453.321, NRS 453.323(1), and NRS 453.332 are part of an overall statutory scheme that is designed to supplement, not supplant, the intended coverage of one another." Paige v. State, 116 Nev Adv Op 21. Clearly, the enactment of NRS 453.332 did not repeal nor supplant NRS 453.323.

For each and all of the above reasons, the defendant's motion must be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

Legislation – Constitutionality

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

ANSWERING BRIEF

COMES NOW, RICHARD A. GAMMICK, District Attorney, by and through , Deputy District Attorney of Washoe County, Nevada, and hereby files this Answering Brief requesting the Court deny the Appeal filed in the above-entitled case as the Statute in question is constitutional. This Brief is based upon the grounds set forth in the attached Points and Authorities, all records and pleadings on file and any oral argument the Court should allow.

DATED this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____
Deputy District Attorney

POINTS AND AUTHORITIES

1.

STATEMENT OF FACTS

ARGUMENT

THERE IS A PRESUMPTION OF CONSTITUTIONAL VALIDITY

In considering the constitutionality of a duly enacted statute, the Nevada Supreme Court in State v. Eighth Judicial District Court, 101 Nev. 658, 708 P.2d 1022 (1985), stated that appellants bear a heavy burden to overcome the presumption of constitutional validity which every legislative enactment enjoys. In List v. Whisler, 99 Nev. 133, 137-38, 660 P.2d 104, 106 (1983), the Nevada Supreme Court stated that:

> Our analysis ... begins with the presumption of constitutional validity which clothes statutes enacted by the Legislature. Viale v. Foley, 76 Nev. 149, 152, 350 P.2d 721 (1960). All acts passed by the Legislature are presumed to be valid until the contrary is clearly established. Hard v. Depaoli, et al., 56 Nev. 19, 26, 41 P.2d 1054 (1935). [...] Further, the presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional. [Citations omitted.]

Moreover, when considering the validity of legislation which is under equal protection and due process attack, the state enjoys a wide range of discretion to make reasonable classifications for enacting laws over matters within its jurisdiction. Graham v. Richardson, 403 U.S. 365, 371 [91 S.Ct. 1848, 1851, 29 L.Ed.2d 534] (1971).

The constitutionality of mandatory helmet laws has been challenged in numerous state courts. See, Love v. Bell, 171 Colo. 27, 465 P.2d 118 (1970). The overwhelming majority uphold, as the Nevada Supreme Court has already held, the constitutionality of the helmet law. State v. Eight Judicial District Court 101 Nev. 658, 708 P.2d 1022.

STANDARD OF REVIEW

When construing the meaning and effect of a statute, the Nevada Supreme Court has consistently held that "[w]here the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its

meaning beyond the statute itself." Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367 (1995)

The Nevada Supreme Court has articulated a clear test for vagueness challenges. The test is whether the terms of the statute are so vague that people of common intelligence must necessarily guess at their meaning. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 177 (1998) citing Cunningham v. State, 109 Nev. 569, 570 (1993). The rule, however, is not to be applied in a vacuum. The court must consider the actions of the defendant on a case by case basis. A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808(1954)(emphasis added).

NRS 486.231, states:
The department shall adopt standards for protective headgear ...

At the end of the Statute it states:

CONCLUSION

The State respectfully requests that the Appeal be denied.

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____

Deputy District Attorney

05305391

Limitations Statute False Pretenses

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_____/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of _____, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_____
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

Defendant concedes that the statute of limitations for criminal offenses begins to run once the crime has been completed. Campbell v. Griffin, 101 Nev. 718 (1985); Pendergast v. United State, 63 S. Ct. 268, 317 U.s. 412, 87 L.Ed. 368 (1943). Yet he attempts to persuade the Court that this crime was completed when the false representation was made (filing a false diploma).

Regarding the general classification of theft which includes Obtaining Money by False Pretenses (See NRS 205.0833(1)), NRS 205.0834 provides, "Amounts involved in thefts committed pursuant to a scheme or continuing course of conduct, whether from one or more persons, may be aggregated in determining the grade of the offense."

Even Bright v. Sheriff, 90 Nev. 168 (1974), relied upon by Defendant, dealt with numerous fraudulent plumbing supply purchases made over a fourteen—month period which were aggregated into a single charge of Obtaining Money by False

Pretenses based upon Defendant's continuous scheme. The misrepresentation involved a false fact or circumstance which was created specifically to mislead and the Court stated at
p.171:, "The method for the creation and execution of the fraudulent scheme may be by express representations, by conduct, or indirectly and by non—disclosure." (Citations omitted).

The case of State v. Carrier, 677 P.2d. 768 (Wash. App. 1984), presents a factual setting directly on point with the instant matter. Carrier was sentenced on the charge of First Degree Theft by Welfare Fraud. The lower Court had found that welfare fraud is a single ongoing offense which is not complete until the last unlawful payment is made. The Defendant had pled guilty to the charge reserving the right to appeal the statute of limitations claim.

The Court of Appeals agreed with the lower Court's finding and stated in its holding at p.770:, "...when the prosecution aggregates a systematic series of relatively minor transactions so as to allege the commission of a single crime, that crime is continuous. The crime is not

completed until the continuing criminal impulse has been terminated."

The Washington Court also reiterated the express holding of another case stating at page 769:

> Where property is stolen from the same owner and from the same place by a series of acts there may be a series of crimes or there may be a single crime, depending on the facts and circumstances of each case. If each taking is the result of a separate independent criminal impulse or intent, then each is a separate crime, but, where the successive takings are the result of a single continuing criminal impulse or intent and are pursuant to the execution of a general larcenist's scheme or
> plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.

See also State v. Brisebois, 692 P.2d. 842 (Wash. App. 1984).

When KENNETH GENE MARINI caused the false diploma(s) to be placed in his files, he did so with the motive of causing

future events to occur. An intent to obtain future benefits is the only rational inference to be made. The crime certainly is not complete when the diploma(s) is filed since MARINI has not reaped the benefits of his actions. Instead, he continued to collect the proceeds of his criminal activity over a period of time consistent with his overall plan or scheme. MARINI obviously had the specific intent to cheat or defraud the City of Sparks by false representation, and solely because of this fraud he obtained money on an ongoing basis for approximately ten years. The State is not required to prove he had the specific intent to obtain money; only that this occurred as a result of his actions. See Bright v. Sheriff, supra.

The applicable test in determining whether there is a continuing crime is whether the evidence discloses one general intent or separate and distinct intents. If there is but one intention, one general impulse, and one plan, even though there exists a series of transactions, there is but one offense. State v. Martin, 616 P.2d. 193 (Haw. 1980); People v. Saling, 48 Cal. App. 3d. 724, 122 Cal Rptr. 1 (1975). “Where a person intends by his false representations to initiate an act which

will cause him to receive illegally various sums of money, it is far more reasonable to consider the whole plan rather than its component parts." Dawson v. Superior Court, 138 Cal. App. 2d. 685, 292 P.2d. 574 (1956).

Defendant stresses the existence of only one act committed -- the filing of the diploma(s). Yet he acknowledes that a false representation may consist of concealment or non-disclosure where there is a duty to speak. See p.5 of Defendant's Motions; Bright v. Sheriff, supra. If concealment or non—disclosure can constitute a false representation, it certainly can continue for ten years. In addition to a continuing scheme or plan stemming from the original act, MARINI concealed and failed to disclose the true facts that he lacks such a diploma and that the diploma(s) was false. His duty to speak when he is knowingly receiving illicit educational pay is without question, especially when he is solely responsible for causing the payments to be made. See e.g. U.S. v. Walsh, 928 F.2d 7, 11 (1st Cir. 1991). Thus, even assuming arguendo that the Court accepts the argument that defendant's scheme was not a continuing one, the State would not be prohibited from charging MARINI with Obtaining Money by False Pretenses over the previous four years.

State v. Martin, supra, at p.197; NRS 171.085(1) (Theft) and NRS 205.0833.

Defendant's authority, Toussie v. U.S., 397 U.S. 194, 90 S.Ct. 858 (1970), is completely distinguishable since the issue therein is whether a single crime should be deemed continuous as an exception to the statute of limitations even though factually it has been completed. Federal law in 1959 required every male to register for the draft on their eighteenth birthday or within five days thereafter. Even the government conceded Toussie's crime was completed at that time
eight years prior to commencing the criminal action. The Court
determined that because draft registrations are instantaneous events and not a continuing process, there is nothing inherent in the nature of failing to register causing it to be viewed as a continuing offense. Historically, "registration was thought of as a single, instantaneous act to be performed at a given time, and failure to register at that time was a completed criminal offense." See p.861.

Recognizing that the statute of limitations begins to run when a crime is completed, the high court held that it should not be extended (tolled) except under limited circumstances.

However, plaintiff is not requesting an extension or tolling of the statute of limitations. Unlike the crime in Toussie v. U.S., supra, the very nature of MARINI's plan or scheme can suggest nothing other than a continuing offense. It simply was not complete and the running of the statute of limitations did not commence until the payments ceased and the scheme was terminated. See, State v. Carrier, supra.

The scathing dissent in Toussie took a similar view. After attacking the legal analysis given in the majority opinion, the dissent then also commented on the factual background of the case and found the defendant's criminal conduct to be Continuous and incomplete (as a matter of fact) based upon his ultimate objective of remaining unregistered. "Based upon his own testimony, petitioner admits that he set out to evade registration and liability for the draft. That aim could only be accomplished by remaining unregistered..." Id., 90 S.Ct. 871.

> Our own cases distinguish the "instantaneous" from the "continuing" offense on the theory that in the former case, the illegal aim is attained as soon as every element of the crime has occurred, whereas in the latter case, the unlawful course of conduct is "set on foot by a single impulse and operated by an unintermittent force," until the ultimate illegal objective is finally obtained. United States v. Midstate Co., 306 U.s. 161, 166, 59 S.Ct. 412, 414, 83 L.Ed. 563 (1939); See also United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224, 73 S.Ct. 227, 230, 231, 97 L.Ed. 260 (1952). At p.871.

The majority decision did not overturn these cases cited by the dissent but instead simply determined the crime to be instantaneous and complete as a matter of law, causing the statute of limitations to commence five days after a person's eighteenth birthday.

In other contexts, Nevada has deemed crimes such as conspiracy to be continuous based upon the continuing

illegal objectives in each case. See State v. Wilcox, 105 Nev. 434
(1989); Crew v. State, 100 Nev. 38, 46 (1984); Foss v. State,
92 Nev. 163 (1967); Goldsmith v. Sheriff, 85 Nev. 295, 306 (1969).

As stated in Goldsmith v. Sheriff, supra, at p.306:

> In the posture of this case the conspiracy continued up to the time of the apprehension of the coconspirators...
>
> The only inference that can be drawn from the record is that the objective of the conspiracy was the insurance proceeds...

The defendant's characterization of this offense as instantaneous is simply not persuasive. Moreover, at most it presents a factual (as opposed to a legal) statute of limitations issue to be decided by the jury. See U.S. V. Walsh, 928 F.2d 7, 12 (1st Cir. 1991) (Embezzlement); U.S. V. Walker, 653 F.2d 1343 (9th Cir. 1981).

Citing Toussie v. U.S., supra, the Court in U.S. v. Maling, 737 F.Supp. 684 (Mass. 1990), held that as far as the legal analysis is concerned, the statute of limitations begins to run when the crime, as alleged, is complete. If the

offense, as charged, continued into the statute of limitations period, the statute is satisfied:

> Furthermore, where an indictment is valid on its face the court should not inquire into the sufficiency of evidence supporting a grand jury indictment. (Citations omitted).
>
> In this case, Count I charges that the conspiracy stretched from “some time in 1973, and continuing to an including August, 1987...” On its face, Count I clearly satisfies the five year statute of limitations. The third superceding indictment was returned on September 21, 1989, and the conspiracy alleged in Count I continues until August, 1987.
>
> As for the actual scope and nature of the conspiracy, this Court shall not make a pretrial inquiry into the sufficiency of the government’s evidence on Count I. The defendants have urged this court to disregard the general rule against pretrial inquiries and to force the government to proffer evidence concerning the statute of limitations. (Citation omitted). The defendants, however, have cited no authority requiring this court to make such a pretrial inquiry, and this

> court shall defer questions concerning the scope and nature of the conspiracy until the government offers its evidence at trial. See United States v. Rivera–Santiago, 872 F.2d 1073, 1079 (1st Cir.), cert. denied, 109 S.Ct. 3227, 106 L.Ed.2d 576 (1989). ("The question of whether there is a single or multiple conspiracy is one of fact for the jury").

Defendant seems to acknowledge this rule of law in his discussion regarding secret offenses at page 3 of his motions. Because the indictment satisfies the statute of limitations on its face the Court may not analyze the facts of the case from the Grand Jury hearing or otherwise in determining legal sufficiency. Once again, this is entirely consistent with Toussie v. U.S., supra, and Campbell v. District Court, 101 Nev. 718 (1985), wherein the charges, as
alleged, were clearly beyond the statute of limitations period and the Court had to rule on the applicability of the "continuous offense" legal exception.

In both, the government represented that the crimes were complete well before the applicable statute of limitations

period. Moreover neither case involved the execution. of a continuing plan or scheme, although the dissent in Toussie presented the argument. In Campbell, supra, the Court held that the crime of escape is “recommitted each day an escaped inmate is not in a custodian’s lawful custody,” but in no way analyzed the facts in terms of an ongoing plan or scheme. Thus, in both cases, the issue was one of law and not of fact. In the instant matter, plaintiff submits there is no such legal issue surrounding Count I, merely a factual one.

Live Testimony Suppression Hearing

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_____/

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

NECESSITY OF LIVE TESTIMONY AT A SUPPRESSION HEARING

The issue directed by this Court to be briefed is whether a criminal defendant who seeks suppression of his statements/admissions to police, mandates a evidentiary hearing which can only be satisfied by the presentation of "live" testimony.

NRS 47.090 refers to "hearings" on the admissibility of confessions or statements by a criminal defendant. No statutory provision requires the State to satisfy its burden by calling witnesses. The burden of proving a waiver of one's Miranda rights is that of a preponderance of evidence. Koza v. State, 102 Nev. 181, 188, 718 P.2d 671, 676 (1986).[16] The State is unable to find any authority that directs and/or

[16] Cited affirmatively in the defendant's initial Motion to Suppress p.4, l.22.

mandates that the State can only meet its evidentiary burden by calling live witnesses. The only authority that would address such issue as to whether or not the evidence is otherwise competent.

As previously indicated to this Court, the Preliminary Hearing Transcript regarding the State's assessment in meeting its burden has been addressed by competent evidence. The testimony of the interviewing detective of the defendant was subject to cross examination and the issue of voluntariness was relevant at the time that the testimony was given at the preliminary hearing in this matter. In fact, all the issues that would speak to the issue of an admissible admission/confession were present during the preliminary hearing and the elicitation of the testimony by Detective Ballew. Further, and it is critical to note, that the State's proper evidentiary objection at the preliminary hearing regarding what the defendant stated his level of consumption of alcohol is the same as would be at the hearing in District Court. Statement's made by a defendant against his penal interest require an aspect of unavailability which is certainly satisfied when the State seeks to admit statements of a criminal defendant. See NRS 51.345. The extent of which the defendant stated to the detectives that he consumed alcohol is self-serving and the State would be unable to cross examine the veracity of such claims. The Justice of the Peace properly sustained the State's objection to questions along those lines. From an evidentiary perspective, that is the same evidentiary ruling that should exist in this case. Thus, the only testimony that can properly address the amount and effect of alcohol on the defendant would be the defendant's testimony itself. That is precisely why there is an evidentiary protection provision of NRS 47.090 which prohibits the use of the testimony of the defendant at a suppression hearing to be used against him at trial.

Thus, the State can properly meet its burden of preponderance of the evidence by any means that would utilize competent evidence. No authority exists for the proposition as defense counsel stated it, that live testimony is mandated in a suppression hearing.

It is well settled that failure to either document or cite authority for contentions is grounds to summarily reject a motion. McKinney v. Sheriff, 93 Nev. 70, 560 P.2d 151, (1977); Wilson v. Olausen, 99 Nev. 362, 664, P.2d 328 (1983); Lisle v. State, 113 Nev. 540 (1997).

Dated this _____ day of _____, .

RICHARD A. GAMMICK
District Attorney

Washoe County, Nevada

By_____

Deputy District Attorney